(23,346 and 23,469)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 771.

AMY B. ZIMMERMAN, APPELLANT,

vs.

FRANK F. HARDING.

FILED SEPTEMBER 3, 1912.

No. 894.

FRANK F. HARDING, APPELLANT.

vs.

AMY B. ZIMMERMAN.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED DECEMBER 21, 1912.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1912.

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1 In the District Court of the United States for Porto Rico.

(Filed August 17, 1912.)

Equity No. 842.

FRANK HARDING
vs.
AMY B. ZIMMERMAN et al.

To Rafael Guillermety, Esq., Clerk of said Court:

In the preparation of the Transcript of Record to be transmitted to the Supreme Court of the United States upon the Appeal this date taken by the Defendant, Amy B. Zimmerman, you will please include all those parts of the Record and proceedings, specified below, showing the date of filing of each, together with such other portions as may be properly indicated by counsel either for the Complainant or for the Defendants, Jacob and Anna Axtmayer:

1. Bill of Complaint. Filed December 1, 1911, incorporating therein the amendments filed January 3rd & 30th, 1912.
2. Separate Answer of Defendant Zimmerman. Filed December 4th, 1911.
3. Order denying Receivership and appointing Auditor. Dated December 6th, 1911.
3*a*. Report of Auditor. Filed.
4. Report of Auditor. Filed.
4*a*. Report (Amended) Filed.
5. Separate Answer of Defendants Axtmayer & Wife Filed Dec. 26th, 1911.
6. Replication of Complainant Filed Jan. 26, 1911.
2 7. Opinion of the Court dated May 18th, 1912.
8. Decree of same date as entered in the Journal.
9. Amended Decree of July 8th, 1912.
10. Certificate of Judge as to the Admission in Evidence of the lease from Axtmayer & wife and the Record in cause No. 831 Law in this Court.
11. Order of July 9th, 1912 confirming sale.
12. Statement of Profit & Loss and the Balance sheet covering the entire period of the partnership as filed by the Auditor.
13. Decree of Distribution of July 17, 1912.
14. Petition of Appeal of Defendant Zimmerman.
15. Order allowing said Appeal.
16. Supersedeas Bond with approval.
17. Assignment of Errors.
18. Copy of Præcipe.
19. Copy of other præcipes if any filed by counsel for other parties, with the parts of the record indicated therein.

(Signed) N. B. K. PETTINGILL,
Counsel for Defendant Zimmerman.

We, the undersigned counsel for the other parties in the above suit hereby acknowledge receipt of the foregoing præcipe. Dated this 17th day of July, A. D. 1912.

(Signed) WILLIS SWEET,
" H. H. SCOVILLE,
Counsel for Complainant.
(Signed) HARTZELL & RODRIGUEZ,
Counsel for Axtmayer and Wife.

3 In the District Court of the United States for Porto Rico.
Sitting at San Juan.

In Equity. No. 842.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN, JACOB AXTMAYER and His Wife ANNA AXTMAYER, Defendants.

Bill of Complaint.

To the Honorable Paul Charlton, Judge of said Court:

Frank F. Harding, of San Juan, Porto Rico, and a citizen of the United States of America, brings this his bill against Amy B. Zimmerman, a citizen of the United States of America, residing at San Juan, Porto Rico, and Jacob Axtmayer and his wife Anna Axtmayer, both citizens of the United States of America, and residents of San Juan, Porto Rico.

And thereupon your orator complains and says:

I.

That in the month of January, 1911, your orator sought of defendants Jacob Axtmayer and his wife Anna Axtmayer the lease of the Hotel called "Eureka-Miramar," situated in the barrio of Santurce, Municipality of San Juan, Porto Rico, said hotel
4 then and now consisting of three buildings, namely: the hotel proper, containing the dining-room, kitchen, a large billiard-room, café, and twenty-four sleeping or bed-rooms; a two story apartment house alongside and practically adjoining said hotel building, containing eighteen bed-rooms; and a two story cement block building containing sixteen bed-rooms, so situated as to be convenient to said hotel building and to the guests thereof; that said Jacob Axtmayer and his wife Anna Axtmayer were at the time your orator approached them for the purpose of leasing said hotel and now are the owners of said group of buildings and lots whereon the same are located, and were in said month of January, 1911, engaged in the business of hotel-keeping and had dedicated thereto the buildings hereinbefore described.

II.

That said defendant stated to your orator that they were willing to lease said hotel property to him under certain conditions which were in substance as follows:

(*a*) The lessee would have to pay to lessors three thousand dollars ($3,000.00) in cash which sum would be held by lessors in the nature of a bond to secure the future payment of rent and also to respond for interest, wear and tear on furnishings, and generally to guarantee the faithful performance of such contract as might be entered into.

(*b*) The lessee must buy of the lessors certain goods and supplies on hand and already ordered by the latter of the value of five
5 hundred dollars ($500.00), and that same must be paid in advance.

(*c*) The lessee would have to pay in advance one month's rent amounting to six hundred dollars ($600.00), and

(*d*) Your orator as lessee must obtain the signature of some other person with him as lessee or as guarantor who should be acceptable to and approved by the lessors.

III.

That in accordance with the conditions offered by defendants Axtmayer to your orator an immediate investment of approximately four thousand dollars ($4,000.00) was required to enter into said contract of lease and to assume charge of said business; that your orator did not have the necessary capital at that time to enter into said business on his sole account, and, moreover, he was required by the terms of said offer to associate with himself in said lease some person acceptable to said lessors; and that thereupon your orator began his efforts to find an associate for said enterprise, and, amongst others, he presented the scheme to the defendant Amy B. Zimmerman; that said defendant Zimmerman, after considering said proposition, announced that she was disposed to enter into the proposed arrangement with your orator, whereupon your orator submitted her name to the defendants Axtmayer for their approval and acceptance as co-lessee, but that said defendants refused to accept said defendant Amy B. Zimmerman as the second name required or as co-lessee, flatly rejecting her name when first proposed and stating that they
6 had already refused to lease her said property, and that it required long and persistent urging on the part of your orator, covering a period of two or three days, to induce said defendants Axtmayer to accept defendant Zimmerman and to contract with her as a co-lessee of said property for the uses and purposes set out in this bill.

IV.

That upon obtaining the consent and approval of defendants as hereinbefore set out, and on the 1st day of February, 1911, your orator and defendant Zimmerman executed with defendants Axtmayer a lease for said hotel property for a period of two years, at a monthly rental of six hundred dollars ($600.00) payable in ad-

vance, and that they did pay to said lessors the sum of five hundred dollars ($500.00) for the goods and supplies mentioned in paragraph II hereof, and did pay to said lessors, defendants Axtmayer, the sum of Three thousand Dollars ($3,000.00) to be held by them to guarantee the faithful performance of said lease as set out in said paragraph II, and did also pay said lessors the sum of six hundred dollars ($600.00) as advance rental for the term of one month, and they thereby became jointly and severally liable for all of the obligations of the said lease; and that the said lease carried with it the right or privilege of renewal for two years more at the rate of eight hundred dollars ($800.00) per month, and an option to purchase said hotel properties and other adjacent properties during the life thereof, it being stipulated therein, however, that the lessees of said property could not sublet the same without the written con-
7 sent of said lessors.

V.

That upon the execution of said lease your orator and defendant Zimmerman entered into a partnership for a term equivalent to the life of the said lease, whereby each of said partners was to contribute an equal proportion of the capital required to begin said business and were to share equally in the profits and losses arising therefrom; and that thereupon your orator paid into the said firm five hundred dollars ($500.00) in cash and defendant Zimmerman paid into the same the sum of Fifteen hundred dollars ($1,500.00) in cash and the two partners executed their joint note in favor of the Royal Bank of Canada for the sum of Two thousand dollars ($2,000.00), it being stipulated and agreed that said note should be paid out of the earnings of said partnership and charged to the respective partners as follows: fifteen hundred dollars ($1,500.00) to complainant and five hundred dollars ($500.00) to the defendant Zimmerman.

VI.

That thereupon and on said 1st day of February, 1911, your orator and defendant Zimmerman entered upon said enterprise, thereby confirming and performing the acts, terms and conditions of said agreement, and that thereafter said business was conducted by your orator and said defendant jointly, your orator attending to the purchasing of supplies, except orders from and for the kitchen, and the general duties connected with the management of said business, such as the assignment of rooms to guests, supervision
8 of the café, dining-room, and the various features of said business, as defendant Zimmerman was occupied much of her time with the management of her mercantile business in the City of San Juan, notwithstanding the partners had agreed that the care of the rooms, laundry, linen, etc. should be specially cared for by defendant Zimmerman.

VII.

That said business was financially successful from the beginning, and that during the first five months thereof it yielded a substantial

profit, but that defendant Zimmerman has in her possession the books and accounts thereof and wrongfully withholds same from your orator, and that on account of his not having access to said books and without an accounting your orator is unable to state the exact amount of the profits of said business for said period, but your orator alleges that the same amounts to several thousand dollars and that your ora[illegible]articipation therein over and above any and all amounts drawn by him are far in access of One Thousand dollars ($1,000.00).

VIII.

That your orator paid out of the income of said business the sum of one thousand dollars ($1,000.00) on account of the note for two thousand dollars ($2,000.00) executed in favor of the Royal Bank of Canada as hereinbefore set out, leaving a balance due on account thereof of one thousand dollars ($1,000.00), it being understood and agreed by and between said partners that one-half of said one thousand dollars would liquidate and pay the amount due and owing by said defendant thereon, and the other half would be applied in reducing the amount that your orator had agreed to pay; and that said defendant signed a new note with your orator for the balance due on said note, it being agreed between her and your orator that said new note should be paid and charged to the account of your orator individually.

IX.

That in accordance with an understanding between himself and defendant Zimmerman, the latter on or about the 1st day of May, 1911, departed for the United States, and after an absence of about eight weeks returned to Porto Rico, your orator remaining in charge of and conducting said business during said defendant's absence; and that on or about the 8th day of July, 1911, your orator left for his vacation in the United States, said defendant taking full charge of said business during the absence of your orator, as your orator had done during her absence in the north, all in accordance with a previous agreement and understanding between said partners. And that during the time intervening between the return of said defendant from the United States and the departure of your orator, she had examined the accounts and transactions of said business and of your orator during her absence, and that upon his departure for his vacation he believed that his said partner was wholly satisfied with the manner in which your orator had conducted said business and with every thing in connection therewith; and that both of said partners left the firm signature of "Harding & Zimmerman" at the bank whereat the firm account was kept, namely, the Royal Bank of Canada, and that either of said partners had at all times the right to make and deliver the check of said firm against any sum that it might have in said bank to its credit, and that both of said partners exercised said privilege, although your orator, as the partner having charge of the purchases, of most of the supplies for said hotel and the settlement,

of the bills of the partnership, did draw many more checks than were drawn by said partner; and that the check book of said firm was always open and subject to the inspection of his said partner, and that she did inspect the same daily, and was always fully advised as to all moneys expended and checks drawn by your orator and the purpose thereof.

X.

That about the 8th day of August, 1911, or about a month after the arrival of your orator in the United States, his brother H. H. Harding, received a letter from defendant Zimmerman in which letter she announced that she had dissolved the partnership existing between herself and your orator, and said defendant Zimmerman also published in the public press of San Juan a notice to such effect and stating that in the future she would conduct the said business on her own account, thereby completely ignoring and disregarding the rights of your orator in said business and in said lease, but leaving him subject to the liability he had contracted on account of the payment of the rent on said hotel as well as all other liabilities of said firm then existing or that might be incurred in the future; and that when your orator returned to San Juan on or about the 6th day of September, 1911, he found that he had been ousted from his interest in the said business in so far as it lay in the power of defendant Zimmerman so to do, but that in attempting to thus eliminate your orator from his rights and privileges in said business, he is informed and believes
11 that he was and is left subject to all of the liabilities incurred under and by virtue of the partnership herein set forth; and that your orator, since his return to Porto Rico, has been notified by defendant Jacob Axtmayer, one of the lessors of said hotel property to your orator and said defendant Zimmerman, that said lessors hold your orator responsible on said lease and will not release him therefrom, and that said lessor will hold your orator responsible for the Execution of each and every obligation already incurred or that may be incurred on account of said lease.

XI.

That your orator considers the lease on said hotel of great value, if said business is properly conducted and managed, and that he bases his judgment as to the value therefrom upon the profits already made during the five months that he was actively engaged in the conduct of the same, upon the fact that the number of Island guests was rapidly increasing, and the further fact that each year shows an increase in the number of people of wealth who are attracted to this Island on account of its winter climate which makes this business a very profitable one.

XII.

That notwithstanding the right of your orator to take his place in said business and the management thereof, and that the lessors of said property have demanded of him that he comply with the

terms of his agreement of lease by so doing, stating in connection with said demand that they were induced to enter into said lease
12 solely upon the solicitations of your orator and with the belief and understanding that he would be to them the responsible party actually and directly in charge of their property, the value of which is largely affected by the successful or unsuccessful management thereof from the standpoint of public approval, yet said defendant has practically turned over the management of said business to one Dr. Tobyme, a man wholly unknown to your orator, and that your orator is informed and verily believes that, to all intents and purposes, said Tobyme is authorized to draw checks against the bank account of said business, to receipt its debts and bills in the name of said Zimmerman, and to otherwise incur obligations on account of said business, and that said Tobyme was so placed in charge of said partnership business by defendant Zimmerman during the absence of your orator as hereinbefore set out and without his knowledge or consent, and that said Tobynne still continues and is now in charge of said business; but your orator is informed and believes and charges the fact to be that said Tobynne is a doctor of medicine and never had any experience in the management of hotels or similar enterprises, and that, due to his inexperience, he is incapable of properly handling and conducting said business; and your orator is further informed and believes that said defendant has drawn from said Royal Bank of Canada the sum of Eleven Hundred and forty dollars ($1,140.00) in cash belonging to said firm of Harding and Zimmerman and that she placed the same to her individual credit in said bank, all of which was done during the absence of your orator in the United States, contrary to his rights in the premises and without his knowledge or consent.

13 XIII.

That your orator does not deem it practicable or desireable, or that under the existing circumstances it would be profitable, for him to exercise the rights which he believes the terms of his said lease and his agreement with defendant Zimmerman authorize him to exercise or demand in the conduct of said business with said defendant jointly, and he has therefore sought the relief set forth in this his bill of complaint; and your orator alleges that the most profitable season of the year for said business is now at hand, and that while his liability continues as herein before set out as well as under the said partnership agreement, yet it is the announced intention of said defendant Zimmerman to appropriate to her own use all of the benefits and profits arising from said business and said lease, wholly and wrongfully disregarding and ignoring the rights and privileges of your orator in the premises.

XIV.

That at the time of the departure of your orator for his vacation in the United States, because of his immediate necessities he had

drawn more money from the funds of said partnership than defendant Zimmerman, but this fact was known to and approved by the latter, and that at the time of your orator's said departure it was understood and agreed between them that he would draw and she would honor his draft for two hundred dollars ($200) in addition to the sum he had received as aforesaid at the date of his departure on his said vacation; and your orator further alleges that he is not a book-keeper, and does not claim any efficiency in that work, but that said firm employed a book-keeper whose business and duty it was to keep the books and accounts of said business and check the cash account thereof, and that the system of
14 keeping said books was insufficient and incomplete, but that your orator had proposed and urged the use of a better more complete, and safer method of keeping said books but his partner said defendant Zimmerman, refused and rejected all proposals to that end.

XV.

That the season now entered upon is the most prosperous of the year in said business; that any mismanagement thereof must result in very serious injury to your orator and would very materially reduce the value of said lease, since the value thereof is dependent upon the safe, economical and satisfactory conduct of said business; and would render him liable to the lessors under said lease; and that the action of defendant Zimmerman in wrongfully placing a stranger to your orator, namely Dr. Tobynne, in charge of said business without the knowledge or consent of your orator and regardless of the inexperience of said manager in said business, the full extent of the authority attempted to be conferred upon said Tobynne by said defendant and the restrictions, if any, placed upon his exercise of such authority (being unknown to your orator) other than as hereinbefore set out to the effect that he was and is authorized to check against the funds produced by said hotel business including the eleven hundred and forty dollars ($1,140.00) transferred as aforesaid from the account of Harding and Zimmerman to the private account of said defendant Zimmerman, places the rights and interests of your orator in great danger of material and substantial loss, and that the rights, assets and interest of *of* your orator
15 so wrongfully attempted to be appropriated by defendant Zimmerman to her own exclusive use and benefit are reasonably worth many thousands of dollars, and the obligations that your orator has incurred and the unnecessary risks that said defendant has by her wrongful conduct as hereinbefore set out rendered your orator liable for, amount to many thousands of dollars, and might lead to his financial ruin.

In consideration whereof, and foras-much as your orator is remediless in the premises at and by the strict rule of law, and is only relievable in a court of Equity where matters of this kind are properly cognizable and reviewable, and to the end, therefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendant may answer the premises, but

not upon oath or affirmation, the benefit whereof is expressly waived by your orator, he now prays the court:

1st. That said partnership be dissolved, and that an accounting be had of all and singular the transactions of said partnership from the date of the formation thereof and its entry into active business and of the profits and assets thereof, especially including the value of the option to buy said property and all the other property set out in said lease, and that the defendant Amy B. Zimmerman be adjudged and decreed to pay to your orator any sum or sums found due to your orator on account of said partnership business down to the present date and the date of the decree herein, your orator being ready and willing to pay any sum or sums that said accounting may show to be due from your orator to said partnership or to the defendant Zimmerman on account thereof.

16 2nd. That a Receiver be forthwith appointed to take charge of every and all of the assets of said partnership and of the said hotel business, and to conduct the same under the order of the Court until said accounting can be completed and the affairs of said partnership completely liquidated so that this Honorable Court can make its decree in the premises forever settling the affairs of said partnership and dissolving the same.

3rd. That defendant Zimmerman on account of her wrongful acts in attempting to appropriate to her own use and benefit all the assets, rights and privileges of said partnership and of your orator appertaining thereto, and of your orator's rights in said lease, which wrongful acts on her part have rendered it impracticable and impossible for her and your orator to carry out the terms and conditions of said partnership and of the said lease, be decreed to have forfeited her right to and interest in said lease and that defendants Jacob and Anna Axtmayer be ordered and decreed to permit your orator to associate with himself another person acceptable to and to be approved by said defendants as contemplated at the time said lease was executed by said defendants.

4th. And may it please your Honor to grant unto your orator a writ of subpœna directed to said defendants Amy B. Zimmerman, Jacob Axtmayer and Anna Axtmayer, commanding them and each of them under a penalty stipulated therein to appear and full, true, and perfect answer make to each and every allegation of this your orator's bill, but not under oath, the benefit thereof being hereby expressly waived.

And for such further and other relief as to your Honor
17 may seem meet and just in equity and good conscience your orator will ever pray.

(Signed) H. H. SCOVILLE,
" WILLIS SWEET,
Solicitors for Complainant.

Frank F. Harding being duly sworn, says he is of age, that he is complainant in the above entitled cause, that he has read the foregoing bill, and that the allegations contained therein are true of his

own knowledge except such allegations as are made upon information and belief, and those allegations he believes to be true.

(Signed) FRANK F. HARDING.

Subscribed and sworn to before me this 1st day of December A. D. 1911.

[SEAL.] (Signed) RAFAEL GUILLERMETY, *Clerk*,
By N. V. COLBURN, *Deputy*.

18 In the District Court of the United States for Porto Rico, Sitting at San Juan.

(Filed Jan. 3, 1912.)

In Equity. No. —.

FRANK F. HARDING, Complainant,

AMY B. ZIMMERMAN et al., Defendants.

Amendment to Bill of Complaint.

To the Honorable Paul Charlton, Judge of said Court:

Now comes the complainant herein by his solicitors H. H. Scoville and Willis Sweet, and in accordance with the Court's order heretofore entered herein amends paragraph XII of said bill so that the same as amended shall read as follows:

XII.

That your orator has a right to take his place in said business, and that the lessors of said property have demanded of him that he comply with the terms of his agreement contained in said lease by so doing, stating that in connection with said demand that they were induced to enter into said lease solely upon solicitations of your orator, and that defendant Zimmerman has practically turned over the management of said business to one Doctor To-
19 bynne, a man wholly unknown to your orator, and, as your orator is informed and verily believes, that to all intents and purposes said Tobynne is authorized to draw checks against the bank account of said business, to receipt its debts and bills in the name of said Zimmerman, and to otherwise incur obligations on account of said business, and that said Tobynne was so placed in charge of said partnership business by defendant Zimmerman during the absence of your orator, as hereinbefore set out, and without his knowledge or consent, and that said Tobynne still continues and is now in charge of said business; but your orator is informed and believes, and charges the fact to be that said Tobynne is a doctor of medicine and never had any experience in the management of hotels or similar enterprises, and that he is incompetent and incapable of properly handling and conducting said business. And your orator

is further informed and believes that said defendant has withdrawn from said Royal Bank of Canada the sum of $1,140.00 in cash belonging to said firm of Harding & Zimmerman and that she placed the same to her individual credit in said bank, all of which was done during the absence of your orator in the United States, contrary to his rights in the premises, and without his knowledge or consent.

(Signed) "

H. H. SCOVILLE,
WILLIS SWEET,
Solicitors for Complainant.

20 In the District Court of the United States for Porto Rico.

Equity. No. 842.

F. F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN et al., Def'ts.

Amendment to Paragraph XI of the Bill.

Now comes the complainant in the above entitled cause by his attorneys, Willes Sweet and H. H. Scoville, and with permission of the Court first had and obtained amends Paragraph XI of his Bill herein so that same as amended reads as follows:

XI.

That you- orator alleges that the value of the lease on the Hotel property and other adjacent properties as hereinbefore set out including the option to buy the same are reasonable worth the sum of Ten Thousand Dollars, and that he bases his allegation as to the value thereof upon the profits already made during the five months that he was actively engaged in the conduct of same, upon the fact that the number of Island guests were rapidly increasing, and the further fact that each year shows an increase in the number of people of wealth who are attracted to this Island on account of its winter climate which makes this business a very profitable one.

San Juan, P. R., Jan. 30, 1912.

(Signed)

H. H. SCOVILLE,
WILLIS SWEET,
Solicitors for Complainant.

(Filed December 4, 1911.)

21 In the District Court of the United States for Porto Rico.

No. 842, San Juan.

FRANK F. HARDING,
vs.
AMY B. ZIMMERMAN et al.

The Separate Answer of Amy B. Zimmerman, One of the Defendants, to the Bill of Complaint of Frank F. Harding, the Complainant.

This defendant, now and at all time hereafter saving and reserving to herself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and other imperfections in said bill of complaint contained, for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for her to make answer unto, says:

I.

That she has no personal knowledge of the matters and things alleged in the first paragraph of complainant's bill, but upon information and belief admits the truth of the same.

II.

That she has no personal knowledge of the matters alleged in the second paragraph of said bill, except as the same were embodied in the contract of lease afterwards entered into in writing between complainant and this defendant on the one side and her co-defendants, Axtmayer and wife, on the other, but she believes them to be immaterial because waived and abandoned except *as* far
22 as so embodied in said written contract of lease.

III.

That defendant admits the allegations in the third paragraph of said bill, except the latter part thereof referring to the alleged unwillingness of her co-defendants Axtmayer to accept her as a co-lessee, which allegations she denies upon information and belief, at the same time considering them immaterial to the matters in controversy herein.

IV.

This defendant admits the allegations of paragraph four of complainant's said bill of complaint.

V.

This defendant admits the allegations of paragraph five of said bill of complaint in so far as the same alleges the formation of a

partnership between complainant and this defendant, and the payments made by the complainant to the capital of said partnership, but she most positively denies the agreement alleged that the note given to the Royal Bank of Canada was to be paid out of the earnings of said partnership, and on the contrary alleges that said capital of $4,000 was by specific agreement to remain in said partnership as assets together with all profits acquired in said business until the funds of said partnership had become sufficient to furnish a proper working capital.

VI.

This defendant admits the matters of fact alleged in the sixth paragraph of said bill, except the intimation contained in the last part thereof that this defendant did not attend to her part of the management of said business, which she denies.

VII.

This defendant denies the allegations of the seventh paragraph of said bill, and alleges that the books of account of said partnership, which had been under the exclusive management and
23 control of complainant up to the time of his departure for the United States in the month of July, were then in such a confused and incomplete condition that it was impossible to ascertain whether said business had been conducted at a profit or at a loss, but subsequent investigation and such straightening out as the books in their incomplete condition were capable of indicated that, because of debts long overdue and remaining unpaid and never entered in the books and of losses sustained in the café because of complainant's mismanagement, the apparent profit had been wiped out, except an amount less than $1,000.

And this defendant further alleges that, instead of complainant having at that time any profit coming to him, the amounts he had drawn before his departure for the United States had absorbed his share of profit and all the capital he had originally contributed to the partnership.

VIII.

This defendant denies all the allegations of the eighth paragraph of said bill, except the allegation that complainant paid out of the income of said partnership business $1,000 on account of the note in favor of the Royal Bank of Canada, referred to in the fifth paragraph of said bill, which payment defendant admits; but she alleges that such payment out of the income was made by complainant during the absence of this defendant in the United States without her knowledge or consent and, upon her return and discovery of the same, against her protest because the capital of the partnership was thereby impaired contrary to the express agreement between them.

IX.

This defendant admits the allegations of the ninth paragraph of said bill, except those declaring that during the time intervening between her return from the United States and the complainant's departure therefor she had examined the accounts and trans-
24 actions of said business as carried on by him during her absence, and that he believed her to be wholly satisfied with the manner in which complainant had conducted the same, which she denies, alleging to the contrary that the books were not in a condition for any intelligent examination and complainant offered her no detailed explanation thereof, concealing from her the existence of the large unpaid and overdue indebtedness in order that he might overcome her protest against his drawing from the funds of the partnership sums sufficient for the expenses of his vacation trip; and that it required nearly a month of investigation and continued effort for this defendant to obtain an intelligent understanding of the condition of the business and of the extent of the mismanagement of complainant during her absence, whereupon, after taking legal advice in the premises, she determined to declare said partnership dissolved for the failure of complainant to comply with his partnership obligations, and mailed to complainant the letter referred to in the tenth paragraph of said bill of complaint.

X.

This defendant admits the allegations of the tenth paragraph of said bill in so far as the same pretends to allege facts, except the allegation that defendant Jacob Axtmayer has notified complainant that he will hold complainant responsible for compliance with the obligations of said lease, of which this defendant has no knowledge but upon information and belief denies the same. But however that may be, this defendant alleges that she has complied and intends to comply with and fulfill each and every of such obligations and is financially able so to do and, in case this Court shall so decree, stands ready to present and file herein a bond with good sureties to save the complainant harmless from any and every obligation under said lease.

25 XI.

This defendant is unable positively to admit or deny the soundness of the opinion expressed by complainant in the eleventh paragraph of said bill, but does aver that up to the present time the great value of said lease has not been demonstrated by any profits realized from the running of the hotel business thereunder, and suggests that the accuracy of complainant's optimism is not capable of legal ascertainment.

XII.

This defendant admits the allegations of the thirteenth paragraph of said bill in so far as the same pretends to allege facts, but denies the legal conclusions therein expressed if that be proper in an answer.

XIV.

This defendant denies all the allegations of the fourteenth paragraph of said bill, except the allegation that complainant at the time of his departure had to the knowledge of this defendant drawn more money from the funds of said partnership than this defendant and *and* another that complainant is not a book-keeper; and this defendant alleges that, instead of consenting to the withdrawal of money by complainant, she protested against it, and that the person employed as book-keeper for the firm was at the same time book-keeper for the firm of Dooley, Smith & Co., of which the senior partner is married to the sister of complainant's wife. But this defendant avers that the confusion and insufficiency of the books was due neither to the inefficiency of the system employed nor to the fault of the book-keeper, but to the failure of complainant to make the proper memoranda and give the proper information to the book-keeper from which complete and sufficient entries might be made; and this defendant particularly denies that complain-
26 ant ever proposed or urged the use of a better or any other system, or that this defendant ever refused or rejected such proposals.

XV.

This defendant further answering avers that at the time she wrote to complainant the letter referred to in the tenth paragraph of said bill she had, under the law of Porto Rico, the right to dissolve said partnership because of the failure of the complainant to comply with his partnership obligations in many and vital respects, some of which are as follows:

(*a*) By violating the partnership agreement as to not impairing the capital and allowing profits to accrue until a sufficient working fund had been obtained. Complainant agreed to contribute $2,000 to the capital; he did contribute $500 and temporarily $1,500 more which he borrowed at the Royal Bank of Canada with the endorsement of this defendant. Before he started for the north in July he had repaid $1000 of the $1500 borrowed money out of firm funds and had drawn $1159 additional for his own use. The balance of the $1500 loan ($500) fell due on December 1 instant and, not being paid by complainant, had to be paid by this defendant as his indorser or surety; so that complainant has received back every dollar which he invested or for which he became responsible upon entering said partnership, together with $659 additional; while this defendant has withdrawn during the same period only the sum of $591.85 and has since found it necessary to re-invest that amount and many hundreds of dollars more in order to relieve said business of the embarrassment caused by the withdrawal of his capital by complainant.

(*b*) By his wanton inattention to business and unseemly conduct toward guests or would-be guests of the hotel.

(*c*) By his mismanagement of the café business, or fail-
27 ure to account for its receipts, which resulted in the loss of money in its operation.

(*d*) By his failure to enter upon the books, or account for, debts owed the partnership which he had collected.

(*e*) By his general incompetence and inexperience, while at the time of the formation of the partnership he represented himself as fully competent and capable of running a hotel and only desiring a partner because of his lack of capital.

(*f*) By employment of servants who were not of good reputation and retaining them after such reputation and bad character were known to him.

XVI.

This defendant further answering alleges that in the month of September, 1911, complainant began his action at law against this defendant in the Insular District Court for the Judicial District of San Juan, basing his cause of action upon the same contract of partnership now set up in his present bill of complaint and alleging that said contract was entered into on the first day of February, 1911, and remained in force until about the 8th day of July, 1911, on which date this defendant voluntarily declared said contract rescinded, and plaintiff claimed damages as for breach of a contract rescinded and ended; that said action at law was by this defendant duly removed into this Court on the law side thereof and set for trial therein, but was thereafter voluntarily dismissed without prejudice at his costs; and that complainant thereby made his election to accept and consider the action of this defendant in so terminating said contract of partnership as a rescission and cancellation thereof, and to hold this defendant responsible in damages therefor, so far as the law would allow, thus estopping himself from claiming or contending that said contract is still existent and in force or
28 that he has any rights in or to said leasehold or the business carried on thereunder. And this defendant claims the same benefit from this defence as though she had pleaded it in bar to said bill of complaint.

And this defendant denies all and all manner of unlawful combination and conspiracy wherewith she is by the said bill charged, without this, that there is any other matter, cause or thing in complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, *is* true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct, and humbly prays to be hence dismissed, with her reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) N. B. K. PETTINGILL,
Counsel for Amy B. Zimmerman,
One of the Defendants.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Amy B. Zimmerman, being first duly sworn, says that she is the defendant in whose behalf the foregoing separate answer is to be

interposed: that she has read the same and knows the contents thereof; and that the allegations of fact therein contained are true of her own knowledge, except those matters alleged upon information and belief, and these she believes to be true.

(Signed) AMY B. ZIMMERMAN.

Sworn to and subscribed before me this 4th day of December, 1911.

(Signed) RAFAEL GUILLERMETY,
Clerk U. S. Court for P. R.

29 In the District Court of the United States for Porto Rico.

(Filed December 6, 1911.)

Equity No. —.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN et al., Defendants.

Order.

That motion for the appointment of a receiver herein coming on to be heard, Willis Sweet and H. H. Scoville appearing for the complainant in behalf of said motion, and N. B. K. Pettingill, representing the defendant Zimmerman in opposition thereto, the Court hears the reading of the bill of complaint and the affidavits of the complainant and of Jacob Axtmayer heretofore filed herein, and the sworn answer of the defendant Zimmerman, whereupon the Court denies said motion for the appointment of a receiver.

Thereupon the Court hears argument on the exceptions for scandal and impertinence filed to the bill by defendant Zimmerman and the same are sustained insofar as they refer to the matters of argument and conclusions stated in paragraphs XII and XV of said complaint and overruled insofar as they refer to allegations of fact, the complainant being given three days to amend his bill to that effect.

It appearing from the bill and answer filed that an accounting in the premises may be necessary to a proper hearing of this cause the Court appoints W. T. Woodbridge to examine the books
30 of account of the partnership Harding & Zimmerman and of all the accounts of the hotel business referred to in the bill and answer herein down to the date of such examination and to report to the Court the result of said examination on or before the 20th day of January, 1912, showing the profits and losses of said business, the same to be shown monthly if practicable, and if not, then from the beginning of said business down to and including the 8th day of August, 1911, and from the latter date down to the date of the completion of said examination and audit; and that

said accountant report to the Court *and* all information obtained from said examination in regard to the manner in which said books were kept together with any and all inconsistencies that may be found therein. Said auditor shall not have the authority to take testimony but is authorized solely to examine the books as found but may request any explanations from the bookkeeper who kept said books or from either of the parties who intervened therein as to any items more intelligible.

It is further ordered that the defendant Zimmerman furnish a good and sufficient bond in the sum of $3,500. conditioned that she will save the complainant harmless from any obligations that he may be caused on account of his signature to the lease of the hotel premises in question, said bond to be approved by the Clerk.

This cause is set down for hearing on the 25th day of January, 1912, at 2 P. M.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

San Juan, P. R. Dec. 6. 1911.

O. K.
(Signed) N. B. K. PETTINGILL.

31 In the District Court of the United States for Porto Rico.

Filed January 20, 1912.

In Equity. No. —.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN, JACOB AXTMAYER and His Wife ANNA AXTMAYER, Defendants.

Auditor's Report.

To the Honorable Paul Charlton, Judge of said Court.

SIR: In accordance with your order under date of December 6th, 1911, I have made an examination of the books and accounts of the partnership Harding and Zimmermann from February 1st, 1911, to August 8th, 1911 inclusive, and from the latter date to, and including December 31st, 1911, and herewith beg to submit my report of such examination.

Your esteemed order calls for a showing of the profits and losses by months, if practicable, if not, then for the periods as above mentioned.

A statement by months was found to be practically impossible, owing to the fact, that at the close of no month did the books show either accrued accounts and bills, payable, nor accrued accounts and bills, receivable. In fact, the statement of profits and losses
32 herewith submitted as of August 8th is, for this reason, an approximation, arrived at however, by the most careful con-

sideration of all the data at hand, supplemented by statements received from various of the then creditors of the partnership.

It was found in the very beginning that while the entries in the Journal and Ledger up to the 30th of June had been made with at least a semblance of regularity, yet no confidence could be placed in the showing of the accounts as they appeared in the ledger; and that many of the journal entries were extremely obscure and palpably in error.

There then only remained the Cash Book and a few entried in the Journal from which to determine the state of accounts. From these entries, supplemented by careful inquiry regarding questionable items, the figures shown in the balance sheet herewith submitted, were prepared.

Aside from the necessary debits and credits to properly adjust the books to the inventories; lists of accounts receivable and payable, etc. as of the closing dates the entries explained below were found to be necessary.

The examination of the bank account disclosed a large number of errors, the net result of which was an increased charge to the bank on the books of the partnership of $15.95.

A charge to Mrs. Zimmermann, and a corresponding credit to Mr. Harding of $98.60; This amount had been paid personally by Mr. Harding to Mrs. Zimmermann, evidently to square the accounts between them in so far as they related to advances made by the latter for the payment of $108.40 to Mrs. Axtmayer and of $59.20 to the Royal Bank of Canada, it being necessary to have these accounts show on the books in order to arrive at the true expenses of the business;

A charge to income account and credit to Mrs. Zimmermann of $136.40 to cover rents collected by the partnership for her
33 personal account for the period August 9th to December 31st, 1911; This entry was made on the statement of Mrs. Zimmermann as to the amount, as it was impossible for us to determine from the books which receipts were for her account and which for the partnership;

Prior to August 8th, 1911, such items had apparently been credited direct to Mrs. Zimmermann's personal account.

One June 29th, we found a rather surprising charge of $105.05 to "Shortage Account." This amount has been included in the expenses for the first period, as it seems to have had the approval of both partners, without question as to the individual or individuals who might have been responsible for said shortage.

In order that the sources of my authority for the use of figures, not shown on the Cash Book or Journal, may be clear, I would say that as regards those for the balance sheet of August 8th, the Accounts Receivable were arrived at by an examination of the old "guest cards" on file; The Accounts Payable from memoranda on the check stubs dated subsequent to August 8th but pertaining to the first period. The inventories were perforce estimated, based on information furnished by Mrs. Zimmermann.

As regards the balance of December 31st, the Accounts Receivable were obtained from the "guest cards" as explained by Mrs. Zimmer-

mann; the Accounts payable were taken directly from the statements on file in the office as unpaid; the Inventories of this date were actual as regards the Bar and House Supplies on hand taken by Mrs. Zimmerman; That of "Furniture," Silver, Linen and Crockery" was carefully estimated by her and as said estimate shows an allowance for depreciation of $850.37 on a total cost of $2,998.53 (28.35%) we believe that it is safe to take these figures as submitted to us.

As your order was not understood to mean that the books
34 should be made to show the proper segregation of the accounts necessary for the preparation of this report (which would also have meant a considerable increase of time necessary for the performance of the work) All such compilation of figures has been done "in the rough" but are being carefully preserved at my office in case of future need. The following exhibits and schedules are hereto attached as part and illuminative of this report.

The Balance Sheet as of August 8th, 1911 (Exhibit A);

The Statement of Income and Expense for the period Feb'y 1st, 1911 to August 8th, 1911 inclusive (Exhibit A Schedule 1); showing profits for this period of $4,494.39.

The balance Sheet as of Dec. 31st, 1911 (Exhibit B);

The Statement of Income and Expense for the period August 9, 1911 to December 31st, 1911 inclusive (Exhibit B Schedule 1); showing profits of $849.61.

Respectfully submitted,

(Signed) W. T. WOODBRIDGE, *Auditor.*

EXHIBIT "A."

Harding & Zimmermann.

Balance Sheet.

August 8th, 1911.

Assets.			*Liabilities.*		
Cash		1,591.39	Bills Payable		500.00
Deposits		2,873.33	Accounts payable: Exhibit A, Schedule 3		1,268.53
Axtmayer	$3,000.00		Total Liabilities		1,768.53
Deduct: Proportionate rent of furniture Feb. 1/11 to Aug. 8/11 inclusive	156.67		Capital accounts:		
		$2,843.33	F. F. Harding	2,000.00	
P. R. Ry. Power & Light Co.		30.00	A. B. Zimmermann	2,000.00	
Inventories		1,300.00	Total Capital	4,000.00	
House Supplies (Est'd)	100.00		Undivided profits: (Exhibit A, Schedule 1)	4,494.39	
Bar Supplies (")	100.00		Total Capital and Undivided Profits		8,494.39
Furniture, Silver, Linen, Crockery, etc., estimated	1,100.00				

EXHIBIT "A"—Continued.

Advance payments		469.15	
Rent	440.00		
Interest	29.15		
Loan accounts		500.00	
F. F. Harding	500.00		
Accounts receivable: Exhibit A, Schedule # 2		972.64	
F. F. Harding: (Current Account) Exhibit A, Schedule # 4		1,959.56	
A. B. Zimmermann (Current Account) Exhibit A, Schedule # 5		596.85	
Total assets		10,262.92	10,262.92

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EXHIBIT "A."

Schedule 1.

Harding and Zimmermann.

Schedule of Income and Expense February 1st, 1911, to August 8th, 1911, Inclusive.

Income.

Board and Rooms	21,616.50	
Bar	2,876.36	
Laundry	15.29	
Total Income		$24,508.15

Expense.

Supplies for House	7,945.66	
Servants' Wages	2,050.93	
Rent	3,760.00	
General Expense	1,158.66	
Laundry	669.88	
Ice	513.31	
Interest	17.50	
License	91.25	
Bar Supplies	2,733.83	
Bar Wages	290.91	
Furniture, Silver, Linen, Crockery, etc. (Depreciation & Loss)	520.11	
Rent for furniture (Axtmayer)	156.67	
"Shortage Account	105.05	
Total Expense		20,013.76
Undivided Profits		4,494.39

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EXHIBIT "A."

Schedule 2.

Harding & Zimmermann.

Schedule of Accounts Receivable August 8th, 1911.

S. Woodson, Wife and Mrs. Peck	38.72
M. L. Kirchhoefer	10.40
Mrs. & Mr. Lewis	29.—
J. L. Carpenter	24.—

J. M. Howals	32.50
C. B. Parker and Wife	27.00
Dr. W. R. Watson	50.34
M. P. Allan & Son	10.00
M. D. Carrel	15.00
L. W. Banner & Wife	309.50
Churchman	9.60
Griffin	13.60
H. De Lano	17.76
A. J. King	8.00
J. Pierson	21.60
Miss Sweet	3.20
Vaughan	5.50
C. C. Curtis	15.90
Schroder	10.50
Washburne & Wife	9.45
M. D. Carrel. July	69.42
Dumarest	10.90
Thompson	20.80
W. T. Tower	17.60
Osmon	4.00
Blanco	31.00
Looke	16.90
Olding	3.00
Ralph Brown	1.00
Chiney	59.45
Mrs. Geil	29.00
Marvin & Brother	48.00
Total	972.64

38 EXHIBIT "A."

Schedule 3.

Harding & Zimmermann.

Schedule of Accounts Payable August 8th, 1911.

P. R. Ice Co	113.78
P. R. Light & Power Co	67.45
P. R. Progress	9.75
Rivero & Co	15.63
Municipio de S. J. (proportion)	6.25
Plaza Provision Co	317.15
American Grocery	201.62
Dooley, Smith & Co	1.75
Gordon & Spaven	4.50
La Esfera	2.10
Sobrinos de Esquiaga	15.50

J. C. George	17.25
Water Bill	93.45
Bermudez Hnos.	13.50
West India Oil Co.	2.75
Laundry	67.20
Telephone	5.65
Times Publishing Co	3.40
Servants' Wages Outstanding	137.55
F. Ortega & Co	10.30
Swift & Co.	8.00
Board of Insular Fair	25.00
Bookkeeper's Bill	120.00
Gonzales Padin Hnos.	9.00
Total	$1268.53

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EXHIBIT "A."

Schedule (4).

Harding and Zimmermann.

Schedule of Entries to the Personal Account of F. F. Harding February 1, 1911, to August 8, 1911, Inclusive.

1911.				Dr.	Cr.
Feb.	4.	By Cash		.....	3.50
March	13.	To Cash		4.15	.....
"	28.	" "	Check # 58,979	98.60	.....
April	5.	" "	Laundry	3.47	.....
"	7.	" "	Gillies & Woodward	1.72	.....
"	9.	" "	P. Schira	23.85	.....
"	20.	" "	"Elks"	18.00	.....
"	29.	" "	Check # 59,042	300.00	.....
June	1.	" "	To meet note	1,000.00	.....
"	5.	" "	The Manhattan Co	44.98	.....
"	29.	" "	"Tickets"	19.30	.....
July	7.	" "	Check # 43,764	500.00	.....
				2,014.07	3.50
1911.					
Feb.	1.	To ¾ interest on $2000, note		44.40	.....
March	28.	By Cash payment to Mrs. Zimmermann (Check 58,979)		.....	98.60
Feb.	28.	To Laundry—personal account		3.19	.....
				2,061.66	102.10
August 8th.		Balance forward to next period		.....	1,959.56
				2,061.66	2,061.66

40 EXHIBIT "A."

Schedule 5.

Harding and Zimmermann.

Schedule of Entries to the Person- Account of Mrs Zimmermann February 1, 1911, to August 8, 1911, Inclusive.

1911.			Dr.	Cr.
Feb.	1.	By Cash	.....	108.40
"	1.	" "	.....	59.20
"	12.	To "	1.00	.....
"	25.	" "	6.00	.....
"	28.	" "	5.00	.....
March	10.	By Room rent	.....	5.00
"	28.	To part of Check # 58,979	133.52	.....
April	3.	By Cash	.....	5.00
"	5.	To Check # 58,981	500.00	.....
May	2.	By Cash	.....	17.65
June	14.	By Cash	.....	7.70
"	29.	To Cash	45.80	.....
July	10.	" "	14.30	.....
"	12.	" "	.50	.....
"	"	" "	1.00	.....
"	15.	" "	4.00	.....
"	"	" "	1.00	.....
"	16.	" "	.75	.....
"	18.	" "	2.00	.....
"	19.	" "	1.00	.....
"	21.	" "	.75	.....
"	22.	" "	1.00	.....
"	24.	" "	2.25	.....
"	25.	" "	.75	.....
"	26.	" "	1.00	.....
"	29.	" "	11.00	.....
Aug.	1.	" "	2.00	.....
"	3.	" "	5.50	.....
"	3.	" "	14.00	.....
"	5.	" "	13.60	.....
			767.72	202.95

1911.				
Feb.	1.	To ¼ interest on $2000 note	14.80	.....
Mch.	28.	To Cash received from Mr. Harding (Check) # 58,979	98.60	.....

Aug.	8. By Sundry credits for room rent collected by Hotel.....		30.00
Aug.	8. By Sundry advances for purchases for account of Inventories.....		51.32
		881.12	284.27
August 8th.	Balance forward to next period.....		596.85
		881.12	881.12

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EXHIBIT "B."

Harding & Zimmermann.

Balance Sheet.

December 31st, 1911.

Assets.			*Liabilities.*		
Cash		2,003.12	Accounts Payable, Exhibit "B," Schedule # 3		4,021.58
In Bank	1,789.03		Total Liabilities		4,021.58
In Office	214.09				
Deposits		2,755.00	Capital accounts:		
Axtmayer	3,000.00		F. F. Harding	2,000.00	
Deduct: Proportionate rent of furniture, viz: Feb. 1/11 to Aug. 8/11	156.67		A. B. Zimmermann	2,000.00	
Aug. 8/11 to Dec. 31/11	118.33		Total Capital		4,000.00
		275.00	Undivided profits:		
Net Axtmayer		2,725.00	Period Feb. 1/11 to Aug. 8/11: (Exhibit A, Schedule 1)	4,494.39	
P. R. Ry. Power and Light Co.		30.00	Period Aug. 8/11 to Dec. 31/11: (Exhibit B, Schedule 1)	849.61	
		2,189.79			
		4,944.79			4,944.79

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House Supplies (actual)	312.28			
Bar Supplies (")	729.35			
Furniture, Silver, Linen, Crockery, etc. (Estimated)	2,148.16			
Accounts receivable: Exhibit B, Schedule # 2		2,107.82		
F. F. Harding (Current Account) Exhibit B, Sched. # 4		2,459.56		
A. B. Zimmermann (Current Account) Exhibit B, Sched. # 5		850.29		
Total Assets		13,365.58		
Total Undivided Profits...			5,344.00	
Total Capital and Undivided Profit..				9,344.00
				13,365.58

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42 EXHIBIT "B."

Schedule 1.

Harding and Zimmermann.

Schedule of Income and Expense August 9th, 1911, to December 31st, 1911, Inclusive.

Income.

Board and Rooms	14,590.57	
Bar	2,817.12	
Total Income		17,407.69

Expense.

Supplies for House	5,971.45	
Servants' Wages	1,796.95	
Rent	2,840.00	
General Expense	1,040.20	
Laundry	539.21	
Ice	380.33	
Insurance	44.42	
License	65.75	
Bar Supplies	1,743.04	
Bar Wages	234.09	
Furniture, Silver, Linen, Crockery, etc. (Depreciation & Loss	330.26	
Rent for Furniture (Axtmayer)	118.33	
Interest	29.15	
Salary (Mrs. A. B. Z.)	1,425.00	
Total Expense		16,558.08
Undivided Profits		849.61

43 EXHIBIT "B."

Schedule 2.

Harding & Zimmermann.

Schedule of Accounts Receivable December 31st, 1911.

Treadwell	54.50
Allen	76.75
Chiney	59.45
Banner	155.20

Bryan	166.35
Brown	1.00
Blanco	33.10
Clark	3.00
Cascada	52.80
J. Carlin	84.58
Carpenter, C.	50.00
Coe	5.00
Decker	11.00
Foote	120.20
Dr. Gile	29.00
Grosch	44.00
Griffin	50.68
Hughard	21.00
King	14.00
Lamont	498.40
Miss Locke	8.00
Lundt	30.00
Martin	9.00
North	2.85
Nase	20.00
O'Neil	171.21
Dr. Porter	15.00
Ryan	15.00
Severance	12.00
Schroder	60.00
Sachs	30.00
Severance	32.00
Miss Sweet	43.00
Judge Sweet	1.00
De Sola	94.75
Woodward	17.00
String	17.00
Total	$2107.82

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EXHIBIT "B."

Schedule 3.

Harding & Zimmermann.

Schedule of Accounts Payable December 31st, 1911.

P. R. American Tobacco Co	108.76
Rivero & Co	26.49
P. R. Brewing Co	59.50
Santurce Tobacco Co	47.50
Cigarettes	21.35
Plaza Provision Co	567.46

H. Barazorda	22.00
Lemons	1.85
H. B. Clafin	190.34
Baker Linen Co.	450.71
Dooley, Smith & Co.	19.25
Dishes	11.14
Gonzales Padin Hnos	12.00
La Primavera	27.50
Ribot & Co.	6.48
Waldrop Photo Co.	5.00
West India Oil Co.	2.75
Water Bill	97.90
Bookkeeper's Bill	66.35
La Sultana	4.60
S. J. Sanitary Steam Laundry	190.98
Swift & Co.	110.42
American Grocery	88.30
A. B. Zimmermann, Salary Acct.	1425.00
P. R. Light & Power Co.	87.60
Telephone	8.30
Santurce Milk Co.	12.46
Servants' Wages Outstanding	349.59
	4021.58

45 EXHIBIT "B."

Schedule 4.

Harding and Zimmermann.

Schedule of Entries to the Personal Account of F. F. Harding, August 9, 1911, to December 31, 1911, Inclusive.

1911.		Dr.	Cr.
Aug. 9.	To balance from last period	1,959.56	.....
Dec. 2.	To balance of note, paid by Mrs. Zimmermann	500.00	.....
Dec. 31.	By balance forward	.....	2,459.56
		2,459.56	2,459.56
1912.			
Jan'y 1.	To Balance brought forward	2,459.56	

46 EXHIBIT "B."

Schedule 5.

Harding and Zimmermann.

Schedule of Entries to the Personal Account of Mrs. Zimmermann, August 9, 1911, to December 31, 1911, Inclusive.

1911.			Dr.	Cr.
Aug.	9.	To Balance from previous period	596.85	.....
Aug.	12.	" Cash	.50	.....
"	15.	" "	.50	.....
"	18.	" "	2.65	.....
"	19.	" "	2.50	.....
"	21.	" "	.50	.....
"	22.	" "	5.60	.....
"	22.	" " (Water tax-Personal acct.).	11.35	.....
"	24.	" "	1.00	.....
Sep.	1.	" "	.35	.....
"	2.	" "	3.50	.....
"	9.	" "	12.00	.....
"	15.	" "	20.00	.....
"	20.	" "	150.00	.....
"	20.	" "	115.00	.....
"	26.	" "	2.50	.....
Oct.	14.	" "	5.35	.....
"	19.	By Cash	.....	2.50
"	20.	To Cash	.10	.....
"	21.	" "	1.00	.....
"	21.	" "	2.65	.....
"	27.	" "	1.50	.....
"	31.	" "	.50	.....
Nov.	5.	" "	3.75	.....
"	12.	" "	2.50	.....
"	14.	" "	1.00	.....
"	18.	" "	2.25	.....
"	19.	" "	2.00	.....
"	25.	" "	.50	.....
"	22.	" "	10.00	.....
Dec.	2.	By payment of note of F. F. Harding	.....	.....
"	4.	To Cash	18.00	.....
"	5.	" Check # 43,932	250.00	.....
"	6.	" Cash	1.00	.....
"	12.	" "	2.25	.....
"	18.	" "	1.00	.....
"	22.	" "	2.00	.....
"	27.	" "	3.00	.....
"	19.	" "	2.31	.....

" 20. " "	200.00	.....
" 21. " "	30.23	.....
" 28. " "	7.25	.....
" 28. " "	11.00	.....
" 30. " "	2.75	.....
" 30. By Room rents collected by Hotel, for personal account of Mrs. Z..	.....	136.40
Dec. 31. By Balance forward.....	1,489.19	638.90
		850.29
	1,489.19	1,489.19
1912.		
Jan'y. 1. To Balance brought forward.....	850.29	

47 In the District Court of the United States for Porto Rico.

(Filed July 18, 1912.)

In Equity. No. —.

FRANK HARDING, Complainant,
vs.
AMY B. ZIMMERMAN, JACOB AXTMAYER and his Wife, ANNA AXTMAYER, Defendants.

Auditor's Report.

To the Honorable Paul Charlton, Judge of said Court.

SIR: In accordance with your order in open court this morning that Mrs. Zimmerman should be allowed at the rate of $200 instead of $300 per month for her services in managing the Hotel Eureka for the period August 8, 1911 to December 31, 1911 and for the period January 1, 1912 to May 22, 1912, and that I should submit to you a memorandum of changes in the accounts necessary in accordance with the above order, I hereby beg to advise you that the personal account of Mrs. Zimmerman should be charged with $475.00 as a reduction of one-third in the amount of $1,425.00 allowed her from the profits of the first period above named; and the amount of $466.67 as one-third of $1,400.00 allowed her from the profits of the second period above referred to, thus increasing the debit balance to her account by $941.67 and increasing
48 thereby the profits shown on my statement to the Special Master by that same amount.

The debit balance to Mrs. Zimmerman's account on July 15, 1912, would therefore be, after this correction is made, $1,306.37 (instead of $364.70), and the total undivided profits $9,253.17 instead of $8,311.50 as shown thereon.

San Juan, Porto Rico, July 17, 1912.

Yours respectfully,

(Signed) W. T. WOODBRIDGE, *Auditor.*

SAN JUAN, PORTO RICO, *July* 17, 1912.

Mr. John L. Haas, Special Master, Hotel Eureka, to W. T. Woodbridge, Dr.

For professional services in the matter of the Examination of the books and accounts of the Hotel Eureka, for the period Feb. 1/11 to May 22/12, and for the period May 22/12 to July 15/12, including the checking of names appearing on the Register to the amounts received as per cash-book, as per allowance by the Court.....$750.00

(Of the above amount $109.52 represents work done at special request of Mr. Harding.)

49 In the District Court of the United States for Porto Rico.

(Filed July 22, 1912.)

In Equity. No. —.

FRANK HARDING, Complainant,
vs.
AMY B. ZIMMERMAN, JACOB AXTMAYER and his Wife, ANNA AXTMAYER, Defendants.

Auditor's Second Additional Report.

To the Honorable Paul Charlton, Judge of said Court.

SIR: In accordance with your verbal order this morning, and with reference to a paragraph on page two of my report to the Special Master as of May 22nd, said paragraph relating to the cash account and mentioning that at this date there was demonstrated to be an overage in the cash for which no reason could be discovered of $185.54, I beg to advise you that the Royal Bank of Canada have submitted to me proof that through an error of their bookkeeper, and in accordance with their letter to Mrs. Zimmerman under date of February 29th, there was, on said date, charged to Mrs. Zimmermann the sum of $130.00 as return of checks which had been deposited to the credit of the Hotel, not properly indorsed. This charge should have been made to the Hotel account instead of to the personal account of Mrs. Zimmermann. This aggregate was made up of one check of one hundred dollars, and three checks for ten dollars each. These same checks, properly indorsed, were re-deposited on March 5th, again to the credit of the Hotel account,
50 causing this account to show two credits for the same checks, without showing the charge for the cancellati-n of the first credit.

To correct the above it is necessary to charge the undivided profits and credit Mrs. Zimmermann's personal account with $130.00, as a correction in part of the unaccounted-for overage in cash discov-

ered in the period of January 1, 1912 to May 22, 1912. The debit balance to Mrs. Zimmermann's account on July 15, 1912, would therefore be, after this (second) correction is made, $1,176.37 instead of $1,306.37; and the total undivided profits would be $9,123.17 instead of $9,253.17 as shown in my letter of July 17th in the matter of the changes necessary to adjust the reduction in salary of Mrs. Zimmermann.

Yours respectfully,

WOODBRIDGE, *Auditor.*

San Juan, Porto Rico, July 22, 1912.

51 In the District Court of the United States for Porto Rico, Sitting at San Juan.

(Filed January 26, 1912.)

In Equity. No. 842.

FRANK F. HARDING, Complainant,

vs.

AMY B. ZIMMERMAN et al., Defendants.

The Separate Answer of Jacob Axtmayer and Anna Axtmayer, His Wife, Defendants, to the Bill of Complaint of Frank F. Harding, Complainant.

These defendants now and at all times hereafter saving and reserving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill of complaint contained, for answer thereto or to so much and such parts thereof as these defendants are advised it is material or necessary for them to make answer unto, say:

I.

That they admit the facts set out in paragraph I of the said bill of complaint.

II.

That they admit the facts set out in paragraph II of said bill of complaint.

III.

That these defendants admit the allegations set out in the third paragraph of the bill of complaint.

52 IV.

That these defendants admit the allegations contained in the fourth paragraph of said bill.

V.

That these defendants have no personal knowledge of the allegations contained in paragraph V of the bill of complaint and do not answer the same because they consider said allegations immaterial to the issues herein as between these defendants and the other parties to this suit.

VI.

That these defendants have no knowledge of the allegations contained in paragraph VI of said bill, and do not answer the same because they consider said allegations immaterial to the issues presented between these defendants and the other parties to this cause.

VII.

That these defendants have no personal knowledge as to the facts alleged in paragraph VII of the bill, but believe the same to be immaterial to the issues herein between these defendants and the other parties hereto, and therefore do not answer said paragraph.

VIII.

That these defendants have no personal knowledge as to the facts alleged in paragraph VIII of the bill, but believe the same to be immaterial to the issues herein between these defendants and the other parties hereto, and therefore do not answer said paragraph.

53

IX.

That these defendants have no personal knowledge as to the facts alleged in paragraph IX of the bill, but believe the same to be immaterial to the issues herein between these defendants and the other parties hereto, and therefor do not answer said paragraph.

X.

These defendants answering paragraph X of the bill of complaint, say that they admit all of the allegations contained in paragraph X of said bill except the allegations as to the attempted dissolution of said partnership existing between the complainant and the defendant Zimmerman, as to which allegations these defendants have no personal knowledge, and the same are not answered because they believe that said allegations are immaterial to the issues raised herein between these defendants and the other parties to this suit.

XI.

These defendants admit the allegations contained in paragraph XI of said bill of complaint.

XII.

These defendants admit all the allegations contained in paragraph XII of the bill in this cause in so far as they allege that these de-

fendants have demanded of said complainant that he take his place in the management of said business and comply with the terms of the lease set out in said bill, but as to the other allegations contained in said paragraph these defendants have no knowledge, and
54 believe the same immaterial to the issues presented in this cause between these defendants and the other parties to this suit, and they therefore do not answer the same.

XIII.

That these defendants admit the allegations contained in the second clause of paragraph XIII of the bill, but have no information as to the allegations contained in the first clause thereof, and believing that the same are immaterial to the issues between these defendants and the other parties to this suit, they do not answer the same.

XIV.

That these defendants have no knowledge of the allegations contained in paragraph XIV of the bill, and believing the same to be immaterial to the issues in this cause as between them and the other parties to this suit, they therefore do not answer the same.

XV.

That these defendants admit the allegation contained in paragraph XV of said bill to the effect that the value of said lease and of the option to purchase all of the properties designated therein is dependent upon the conduct of said business during the months being entered upon at the date of the filing of said bill, and that the complainant is liable to these defendants under said lease; but they do not answer the other allegations contained in said paragraph because they consider the same immaterial to the issues presented in this cause as between these defendants and the other parties hereto.

55 XVI.

These defendants allege that it is true that they leased the property mentioned in the bill herein to the complainant Harding and the defendant Zimmerman jointly with the condition that the same could not be sub-let without their consent, and with the understanding that said property would be under the management of the complainant Harding; that they have no knowledge as to the methods of accounting or the manner whereby the books of said concern are kept; that said complainant and defendant Zimmerman have violated their agreement with them, and have endangered the success of the property belonging to them by the difficulties which have arisen between them; that they are unwilling to have said business continue in charge of the said defendant Zimmerman, and are unwilling that she should continue in charge of said property under said lease; that she has had no experience, and is incompetent to handle a hotel business of this magnitude.

Notwithstanding the fact that the complainant and the defend-

ant Zimmerman have violated their said contract, these defendants are willing that said complainant and defendant Zimmerman, or that the said complainant, should continue with said lease under the terms and conditions therein set out.

Wherefore these defendants pray that a decree of this Court be entered herein either compelling the defendant Zimmerman to continue said business with the complainant as manager thereof, or that the said complainant be decreed to have the right to the sole management of said lease in accordance with the terms
56 thereof, or that the said lease be cancelled because of the violation thereof by said parties complainant and defendant Zimmerman and that the said property be ordered to be returned to these defendants under the conditions provided therein; and that these defendants be decreed to have their costs and charges in this behalf most wrongfully sustained.

(Signed) ANNA AXTMAYER,
(Signed) JACOB AXTMAYER,
Defendants.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Jacob Axtmayer being first duly sworn says that he is one of the defendants in whose behalf the foregoing separate answer is to be interposed; that he has read the same and knows the contents thereof, and that the allegations of fact therein contained are true of his own knowledge except those matters alleged upon information and belief, and those he believes to be true.

(JACOB AXTMAYER.)

Sworn to and subscribed before me this 26th day of January, A. D. 1912.

(Signed) RAFAEL GUILLERMETY,
Clerk Dist. Court of U. S. for P. R.,
By N. V. COLBURN, *Deputy.*

57 In the District Court of the United States for Porto Rico, Sitting at San Juan.

(Filed January 26, 1912.)

In Equity. No. 842.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN et al., Defendants.

Replication.

This replicant, Frank F. Harding, saving and reserving to himself all and all manner of advantages of Exception which may

be had or taken to the manifold errors, uncertainties, and insufficiencies of the separate answers of the defendants, Amy B. Zimmerman and Jacob and Anna Axtmayer, for replication thereunto saith that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be answer- unto by said defendants, and the answers of defendants are very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that that any other matter or thing in said answers contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied is true; all which matters and things this replicant is ready to aver, maintain, and prove, as this Honorable Court shall direct, and humble prays as in and by his
58 said bill he hath already prayed.

San Juan, Porto Rico, January 26th, 1912.

(Signed) H. H. SCOVILLE,
" WILLIS SWEET,
Solicitors for Complainant.

59 In the District Court of the United States for Porto Rico

(Filed May 18, 1912.)

No. 842. Equity.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN ET AL., Respondents.

Opinion.

In the month of January, 1911, the complainant Harding entered into negotiations with the respondent Jacob Axtmayer and Anna, his wife, for a lease of the premises known as the Eureka-Miramar Hotel, at Santurce, a suburb of San Juan, which premises consist of two structures, one of wood, and one of stone, and were at that time being operated by the respondents Axtmayer as a hotel. It appears from the evidence that the terms proposed by said Axtmayer were too onerous, in a financial way, for the complainant Harding to accept, and he requested the respondents Axtmayer to permit him to associate another person with him in the lease and operation of said premises. To this proposal the respondents Axtmayer finally consented, and, on February 1, 1911, it is alleged by all parties that a lease was entered into in writing, although it never was produced in court or offered in evidence. Said lease substantially provided for the leasing to Harding and Zimmerman of the two houses constituting the Eureka-Miramar Hotel, at a monthly rental of $600.00, for a period of two years, with the option of a
60 renewal for two years at the expiration of the term; and a requirement that the lessees should deposit with the respon-

dents Axtmayer and his wife, the sum of $3,000.00 in cash, in lieu of a bond for rent. It was also in evidence that the lease contained an option of purchase of certain other properties in that vicinity belonging to the respondents Axtmayer, at a price of $90,000.00, to be exercised during the continuance of the lease. The testimony in that regard was so indeterminate as to offer no legal basis by which the Court could come to a conclusion as to the value of said option. In any event, it was never attempted to be acted upon by the parties, and the fact that it is virtually abandoned is evidenced by the construction by the respondents Axtmayer of a building adjoining the Eureka-Miramar Hotel on a portion of the premises covered by said option.

About the same date, February 1, 1911, the complainant Harding and the respondent Zimmerman entered into what is alleged to have been a verbal contract, under and by virtue of the terms whereof, they were to operate the Eureka-Miramar Hotel as a partnership. No definite term for the duration of the partnership seems to have been fixed or agreed upon between the parties thereto. In order to provide funds for making the deposit required by the lease, and for purchasing certain furniture and supplies then contained in said hotel, it was necessary for the partnership to provide itself with funds to the amount of $4,000. which was furnished in the following manner: The respondent Zimmerman contributed $1,500.00 in cash, and the complainant Harding $500.00 in cash; the remaining $2,000.00 was the proceeds of a note of Harding & Zimmerman to the Royal Bank of Canada, payable in six months, or upon July 1, 1911, and it appears from the evidence that the inequality in cash contribution was to be balanced by the liability for the payment of the note above referred to. The
61 evidence is conflicting as to what the exact agreement between the signers was, but the weight of evidence appears to be to the effect that Harding was to provide $1,500.00 of the amount and Zimmerman $500.00. The mutual duties of the partnership were to be the charge, by the complainant, of the office of the hotel, of the assignment of guests to rooms, of the operation of the café, and of the dining room; while the respondent Zimmerman was to have charge of the operation of the rooms occupied by guests, of the housekeeping, and the purchase of supplies for the house and for the kitchen. This duty she was to perform by a proxy to be furnished by her without cost to the partnership, as the respondent Zimmerman was privately engaged in a business in the city of San Juan, which occupied her fully during the business hours of the day.

The hotel was operated with considerable success, under this arrangement, until, in the month of April, 1911, the respondent Zimmerman left San Juan for a visit to the United States, returning about July 1, 1911. Seven days thereafter, or upon July 8, 1911, the complainant Harding departed for the United States on his vacation, leaving the respondent Zimmerman in full charge of the hotel. On August 8, 1911, the respondent Zimmerman notified the complainant Harding in writing that she elected to terminate

the partnership for the general reason that the complainant had failed to keep his partnership obligation, and had not conducted himself properly in his portion of the business, without definite specification, so far as is shown by the evidence, of the lapses which she alleged him to have made. It may be noted in passing that this letter of notification to Harding by the respondent Zimmerman was never put in evidence. When the complainant
62 Harding returned to San Juan early in September, 1911, he found that the respondent Zimmerman had taken full charge of the business, had transferred the bank account of Harding & Zimmerman into her own name, and into another bank, and declined to permit him to enter the hotel, or to take any part in its operation.

Subsequently, and up to this date, the defendant Zimmerman has continued in the sole operation of said hotel property, and the plaintiff Harding has been excluded from any participation therein, either as to the management thereof or as to participation in the profits resulting from such operation, if any.

The testimony on behalf of the respondent, in justification of her attempted termination of the partnership, showed that the method of primary entry of the accounts of the partnership was by the card index system; that these cards were kept in the office of the hotel, and were supposed to contain all charges that could legitimately be made against guests, for their board, laundry, advances, bar charges, and otherwise. These entries were primarily supposed to be made by the plaintiff, and it appears that for the most part they were so made. The receipts from the bar were placed in a cigar box, at the close of the business day, and were taken, either by the complainant or the barkeeper, to the room of the plaintiff in the hotel, where they were kept until the next day. From the cash so obtained, or from cash paid by guests, and placed in the safe of the hotel, deposits were made in the bank, petty bills were paid at the hotel and advances were from time to time made to guests, the latter being supposed to be entered in each case upon an appropriate card in the card index. In some cases this was not done, and required to be supplemented by oral evidence or memoranda contained on
63 loose sheets of paper. It was customary to have a bookkeeper, otherwise engaged during the day, come each evening, and he, with the assistance and under the direction of the respondent, made entries in the books of the partnership of the various transactions of the day. The complainant does not appear to have participated in the posting of the books.

The whole conduct of this business, from a financial point of view, was so grossly loose, and childishly incompetent, that only the large patronage which it enjoyed, amounting practically to a monop-ly saved it from involving the parties in serious financial loss and failure. It is almost inconceivable that two persons of full age, and in possession of normal faculties, could have so conducted a business involving the amounts here considered. In any event, and without affirmative action by either party, it is probable that the partnership

would soon have terminated itself as a necessary result of the method of the management of the business.

After hearing all the testimony that was offered on either side, and after able and exhaustive argument by counsel for both parties, the case was finally submitted for my consideration upon February 16, 1912. Since that time I have exhaustively and carefully gone over all the evidence submitted, both oral and written, including the report of an accountant heretofore appointed, which gave in detail the operation of the business from its inception on February 1, 1911, up to and including December 30, 1911. I have also carefully considered the cases submitted by counsel for both parties and have reviewed their arguments as to fact and law.

64 Whatever unfounded, loose and intemperate statements a nervous woman may make to counsel in advance of the bringing of a case, it is when evidence is submitted to the test of a cross examination in a judicial trial that the real basis of the fact is made apparent. This was more signally illustrated in the testimony of both the parties to this case, and especially that of the respondent, than I remember to have observed it in any other matter that has come before me.

I am of opinion that, under all the evidence and under the existing law, not only the law of Porto Rico in relation to partnerships, but also the general jurisprudence of the United States, the respondent Zimmerman was without legal warrant in taking into her sole possession the property and assets of the partnership upon August 8, 1911, and in excluding the complainant from a joint share in the management and profits thereof, and that her action taken upon said last mentioned date, did not, in law, dissolve said partnership, but that, in spite of the physical exclusion of complainant from said business, said partnership has continued in force until this date.

Testimony was introduced on behalf of the respondent tending to show gross carelessness in the manner in which the plaintiff handled the cash receipts at the bar, and, from oral and other evidence, including the testimony of the parties hereto, and of the barkeeper, and from the report of the accountant filed herein, it would seem that the sum of $618.00, as an approximate amount, would remain to be accounted for by the complainant from such receipts, and that he should be surcharged therewith.

The respondents Axtmayer and wife having interjected themselves into this proceeding, and having taken a position so anomalous as to be irreconcilable with any facts of the case in dispute between the parties, have subjected themselves and their rights

65 to the adjudication of this court. They hold the sum of $3,000.00 cash, an asset of the partnership, in lieu of a bond for rent; the lease to Harding & Zimmerman is still in existence, and the rest is not in default, and yet they attempt to dispose of the same in a manner to suit their own convenience, and without regard to any rights which either of the parties hereto may possess.

The whole case is surrounded with such inconceivable inconsistencies, and shows such lack of business knowledge and sense in the

parties, as to make it difficult to be dealt with in a practical way upon the dissolution of this partnership.

It is, therefore, hereby ordered that the "partnership heretofore existing between Frank F. Harding and Amy B. Zimmerman, in the management and operation of the property and business known as the Hotel Eureka-Miramar, in San Juan, Porto Rico, is hereby dissolved as of this date, and John L. Haas is hereby appointed Special Master of this court, with the direction that he shall immediately take charge of, and operate said property and business, and its assets, including furnishings, supplies, cash in hand and on deposit, the lease of the premises, and any other and all property and assets thereof which are now in the possession of the respondent, Amy B. Zimmerman, or any other person or persons for her, or in her behalf. And such persons, and each of them are hereby ordered to deliver to the Special Master herein appointed all of such property and assets, of every name and nature. The Special Master is further ordered and directed to take into his possession, as such Special Master, any and all sums of money, whether cash in hand in said hotel, or on deposit in any bank within this District,
66 for the purpose of carrying out this decree. He is ordered, further, to make a careful and true inventory, of all the property and assets of said partnership, and to sell the same, as Special Master of this court, at public auction upon said premises, after advertisement in a daily newspaper published in the city of San Juan, Porto Rico, and in a daily newspaper published in the city of New York, state of New York, for a period of thirty days in each. The Special Master is authorized and directed to accept at said sale the highest and best price therefor, for which he receives a responsible cash bid; he is authorized and directed to sell said properties, either as a whole, and as a going concern, or in such parcels, or parts, as may be most for the benefit of said partnership, but he is authorized to refuse any or all bids for said property or assets, or any part thereof, in case he shall deem the same inadequate, and he is authorized to place the purchaser, or purchasers, at said sale, in possession of any property or assets purchased thereat, including the unexpired lease of the hotel premises; and respondents Axtmayer are hereby required to accept as a tenant the purchaser of said unexpired lease, provided such purchaser shall comply with the terms of said lease, and other conditions, as to security and otherwise, in relation thereto.

When such Special Master shall have reduced to cash all the property and assets of said partnership, he shall make a report of his doings in that behalf to this Court; shall state an account of the operation of said partnership from February 1, 1911, to this date, and the independent accounts of the parties hereto in relation to said business, in which the complainant herein shall be surcharged the sum of $618.00 on account of bar receipts, and
67 for the purpose of said account he is hereby authorized to employ the services of a certified accountant to be selected by him.

Until said sale is made by said Special Master, and the properties

sold thereunder shall be delivered, he shall continue to operate the said Hotel Eureka-Miramar for the benefit of said partnership. The said Special Master is to give a bond in the sum of $2500.00 for the faithful performance of his duty, with sureties to be approved by the Court.

(Signed) PAUL CHARLTON, *Judge.*

68 In the District Court of the United States for Porto Rico.

(Journal Entry May 18, 1912.)

Equity. 842.

FRANK HARDING
vs.
AMY B. ZIMMERMAN et al.

Decree.

This cause came on to be heard and was finally submitted to the consideration of the Court on the 16th day of February, A. D. 1912, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

The Court finds and decrees that the partnership heretofore existing between F. Harding and Amy B. Zimmerman, in the management and operation of the property and business known as the Hotel Eureka-Miramar, in San Juan, Porto Rico, is hereby dissolved as of this date, and John L. Haas is hereby appointed Special Master of this Court, with the direction that he shall immediately take charge of, and operate said property and business, and its assets, including furnishings, supplies, cash on hand and on deposit, the lease of the premises, and any other and all property and assets thereof which are now in the possession of the respondent, Amy B. Zimmerman, or any other person or persons for her, or in her behalf, And such persons, and each of them are hereby ordered to deliver to the Special Master herein appointed all of such property and assets, of every name and nature, The Special Master is
69 further ordered and directed to take into his possession, as such Special Master any and all sums of money, whether cash in hand in said hotel, or on deposit in any bank within this district, for the purpose of carrying out this decree. He is ordered, further, to make a careful and true inventory of all of the property and assets of said partnership, and to sell the same, as Special Master of this Court, at public auction upon said premises, after advertisement in a daily newspaper published in the City of San Juan, Porto Rico, and in a daily newspaper published in the City of New York, State of New York, for a period of thirty days in each. The Special Master is authorized and directed to accept at said sale the highest and best price therefor, for which he receives a responsible cash bid; he is authorized and directed to sell said properties, either as a whole, and as a going concern, or in such parcels, or parts, as may be most

for the benefit of said partnership, but he is authorized to refuse any or all bids for said property or assets, or any part thereof, in case he shall deem the same inadequate, and he is authorized to place the purchaser or purchasers, at said sale, in possession of any property or assets purchased thereat, including the unexpired lease of the hotel premises; and respondents Axtmayers are hereby required to accept as a tenant the purchaser of said unexpired lease, provided that such purchaser shall comply with the terms of said lease, and other conditions, as to security and otherwise, in relation thereto.

When such Special Master shall have reduced to cash all the property and assets of said partnership, he shall make a report of his doings in that behalf to this Court; shall state an account of
70 the operation of said partnership from February 1, 1911, to this date, and the independent accounts of the parties hereto in relation to said business, in which the complainant herein shall be surcharged the sum of $618.00 on account of the bar receipts, and for the purpose of said account he is hereby authorized to employ the services of a certified accountant to be selected by him.

Until said sale is made by said Special Master, and the properties sold thereunder shall be delivered, he shall continue to operate the said Hotel Eureka-Miramar for the benefit of said partnership. The said Special Master is to give a bond in the sum of $2500.00 for the faithful performance of his duty, with sureties to be approved by the Court.

71 In the District Court of the United States for Porto Rico.

(Filed July 8, 1912.)

No. 842. Equity.

FRANK HARDING, Complainant,
vs.
AMY B. ZIMMERMANN et al., Respondents.

Amended Decree..

This cause coming on to be heard upon the 6th day July, 1912, the parties being present in person and by counsel, and the court being fully advised in the premises, it is hereby adjudged and decreed:—

That the order of the Court heretofore made herein on the 18th day of May, 1912, be amended so that it specifically includes among the property and rights to be sold under the order of the Court hereinbefore made, the option of renewal and purchase mentioned in the lease between Harding and Zimmerman and Jacob Axtmayer and wife, in relation to the properties known as the Hotel "Eureka Miramar," and others adjacent thereto.

It is further ordered, adjudged and decreed:—

That the order of the Court heretofore entered upon May 18th, 1912, be further amended by the requirement that advertisement

of the time and place of the sale under the decree herein
72 shall be fixed for the period of four weeks instead of thirty days, as provided in the former order herein.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

73 In the District Court of the United States for Porto Rico.

Filed July 17, 1912.

No. 842. Equity.

FRANK HARDING
vs.
AMY B. ZIMMERMANN, et al.

I hereby certify that, in the course of the trial of this cause before me sitting as a Chancellor and hearing the evidence of the parties orally, there was offered in evidence on behalf of complainant and admitted the lease made between defendants, Axtmayer and wife as lessors, and complainant Harding and defendant Zimmermann, as lessees, which was in words and figures following, to wit:

Number Thirteen.

Lease.

In the City of San Juan de Puerto Rico, on the thirty-first day of January, nineteen hundred and eleven, before me, F. Ramirez de Arellano, Attorney at Law and Notary, with residence in this City; appeared [SEAL.] Mrs. Anna Axtmayer, fifty four years old, married proprietress, and resident of this City; Also her husband Mr. Jacob Axtmayer, fifty five years old, Contractor, and a resident of this City, Mr. F. F. Harding, forty years old married, proprietor, and resident of this City; and Mrs. Amy B. Zimmermann,
74 forty three years old, widow, and resident too of this City. They have, in my judgment, the necessary legal capacity to execute this deed of Lease and Mister and Mistress Axtmayer, says; That he, Jacob Axtmayer, is the owner of the following property: (*a*) Solar, situated in "Miramar" ward of Santurce, Municipality of San Juan composed of one thousand and thirty two meters, ninety decimeters; and bounded on the North by "Laguna" Street; on the West by "Olimpo" avenue; on the East by solar thirtieth; and on the South by solar number two. This lot contains a two *stories* house, with masonery foundations, and balconies in both stories. That she Anna Axtmayer is the owner of the following lot: (*b*) Solar, number seventeenth, in the same place, composed of four hundred and eighty four square meters, fifty centimeters; bounded on the East by "Olimpo" Avenue; on the North by Solar
[SEAL.] sixteen; on the South by Solar number eighteen; and on the West by solares thirty three and thirty four. This

lot contains a two *stories* cement blockhouse. (*c*) Solar number thirteen, in the same place, ward and Municipality *than* the former ones, composed of six hundred and thirty square meters; bounded on the north by "Laguna" street; on the West by lot fourteen; on the East by lot twelve; and on the South by solar number two. This lot contains a two *stories* building known as "Eureka" Hotel. Second: That they acquired the already described properties as follows: Solar Marked (*a*) by purchase *to* the Cooperative Association
75 of construction and loans as per deed recorded in the Registry of the Property of San Juan, at page two hundred and eleven, book fifty three of this City, Solar marked (*b*) was acquaired by assignment from Mr. José Bazán, as per deed dated eleventh of May, ninteen hundred and seven; and solar, marked (*c*) by purchase *to* Juana Falero, as per deed dated the twenty third day of March, nineteen hundred and seven, Third: That by virtue of this present deed, the parties of the first part, *has* leased, and by *this* presents do Lease, unto the parties of the second part, the described properties, including furnishing as at present, not including bed linen or table linen or rugs, being this contract of lease entered accordingly with the following conditions: [SEAL.] First: The term of this contract is of two years, beginning from the first day of February nineteen hundred and eleven, until same date nineteen hundred and thirteen. Second: This contract includes all furniture, bar, and fixtures, Billiard tables etc. Third: The monthly rental is six hundred dollars payable in advance. After the expiration of this contract, the rental will be raised to eight hundred dollars, if the parties of the second part desires to renew*al* the same, Four: Property leased by this present deed must be kept in first class condition by lessee, excluding general outside repairs, painting for account of lessor, water, light etc. by lessee, paying the lessor taxes and insurance. Fifth: By this deed it is agreed that a deposit of three thousand dollars shall be made by the parties of the second part, as a guarantee of rent, with the understanding that twenty four hundred Dollars, will be returned to the party of the first part or *its* successors, at the end of the two years, and six hundred dol-
76 lars, will be deducted from the Three thousand dollars, and changed for the use of the furniture. Sixth: It is mutually agreed that if the parties of the second part do*es* not pay the rental corresponding to any month, after thirty days, the party of the first part may, at his will, declare forfeited this contract of lease and apply to the Courts for action. Seventh: The parties of the second part will not change the name of the Hotel, which will continue to be the "Eureka Miramar". Eighth: Both contracting parties agree that a copy of this deed may be presented at Registry of Property of San Juan for registration. Ninth: In case that the parties of the second part desire*s* to renew*al* this contract, or not ,they must notify the party of the first part, to the effect, three months before time of expiration of this contract. Tenth: This contract cannot be sub-let-ed to any body, except with the consent of the party of the first part. Fourth. It is further agreed that, by this document, the parties of the second part, have the option to purchase not only the de-

scribed properties, but any other property that the party of the first part, may owns at present in Miramar, *by* the sum of ninety thousand dollars; and that, *by* the same price, parties of second part, have preference on any other purchaser, being understood that in case the party of the first part, or her successors, should *sale* or dispose of, any outside property in "Miramar" the price of this sale shall be deducted from the amount of option. [SEAL.]

Warnings.

77 I, the Notary, made the parties the necessary legal warnings. It was *this* executed before me, and in the presence of the instrumental witnesses, Mr. Isidro Benitez, and M. F. B. Newell, of age and resident of this City. This present deed was read by the contracting parties and witnesses, they found it correct, and signed it together with the witnesses. Of all of which, viz: the acquaintance with the contracting parties, and witnesses; their age, *statue* professions, and domicile, and also of everything related or affirmed in this public document, I the Notary Certify. Anna Axtmayer.—F. F. Harding.—Amy B. Zimmermann.—F. B. Newell.—Jacob Axtmayer.—Isidro Benitez.—Signed and Sealed, F. Ramirez de Arellano, Notary Public. This is a first copy, conforming with the original that remains in the protocol of the public documents under my care and at the request of Jacob Axtmayer, I issue same at Puerto Rico, on the nineteenth day of August, nineteen hundred and eleven.

.50 Excise Stamp.

[SEAL.] (Signed) F. RAMIREZ DE ARELLANO,
Notary.

I further certify, that thereafter there was offered in evidence on behalf of the defendant Zimmermann and admitted the record in the law case No. 831 Between the same parties, which had been begun by the plaintiff in the Insular District Court of San Juan and removed into this Court by the defendant, of which the material parts are in words and figures following, to wit:

78 (*Translation of Complaint.*)

In the District Court of the Judicial District of San Juan, Section 1.

No. 5086.

FRANK F. HARDING, Plaintiff,
vs.
AMY B. ZIMMERMANN, Defendant.

To Collect Money.

To the Honorable Felix Córdova Dávila, Judge of said Court:

The plaintiff, Frank F. Harding, through the undersigned attorneys, complains of Amy B. Zimmermann, and says:

I.

That the plaintiff and the defendant reside in the Judicial District of San Juan, Porto Rico, and that all the matters related in this complaint took place in said District.

II.

That by an agreement entered into between the plaintiff and the defendant on the 1st day of February, 1911, they agreed to go into business of hotel keeping in Santurce, within the municipality of San Juan, Porto Rico, and for that purpose they leased the group of buildings known collectively by the name of "Hotel Eureka." That said agreement was made for the term of two years from February 1st, 1911, and that pursuant thereto both contract-
79 ing parties, complying with the conditions of said contract, opened said Hotel about the date of February 1, 1911, and continued associated in said business until about the 8th day of July, 1911; on which date, the plaintiff being in the United States with the consent of and by agreement with the defendant, the latter voluntarily and without legal excuse for duing so declared said contract rescinded, and notified the plaintiff and the public that from that date thenceforth she had taken charge of said business individually, thus violating the conditions of the contract and infringing the rights of the plaintiff.

III.

That during all the time after the 1st day of February, 1911, the plaintiff complied faithfully and legally with all the obligations which said contract imposed upon him; but that, as has been already alleged, the defendant on said 8th day of July, 1911, without previous notice to plaintiff and without legal excuse to justify it, violating the conditions of said contract, took control of all the assets of said partnership and from that date has excluded the plaintiff from said partnership and from the possession of the property which belongs to it and from participating in the profits produced by said hotel business.

IV.

That said business is one which produces large profits, not being less than ten or twelve thousand dollars per year.

V.

That, by reason of the facts aforesaid, the defendant owes
80 to the plaintiff, after deducting all and each of the sums received by him, the sum of twelve thousand nine hundred seventy-eight dollars and seventy-five cents ($12978.75) and also is indebted to him for one-half of the profits which said hotel business would produce during the one year and six months remaining before the contract ends, which would be the sum of three thousand seven hundred fifty dollars ($3750.00), or a total of sixteen thousand seven hundred thirty-seven dollars and seventy-five cents, ($16,737.75).

For the reason stated, the plaintiff prays that, after the citation of the defendant in this case and the trial of the suit, the defendant be adjudged to pay to the plaintiff said sum of sixteen thousand seven hundred thirty-seven dollars and seventy-five cents ($16,737.75) together with the costs incurred in this suit and attorney's fees.

San Juan, P. R., September 16, 1911.

(Signed) HORD & SCOVILLE,
Attorneys for Plaintiff.

81 In the District Court for the Judicial District of San Juan, P. R., Section 1.

No. 5086.

FRANK F. HARDING
vs.
AMY B. ZIMMERMANN.

Order for Removal.

The above cause coming on for hearing upon application of the defendant therein for an order transferring and removing the same to the District Court of the United States for Porto Rico; and it appearing to the Court that the defendant has filed her petition for such removal in due form of law, and that she has also filed a bond duly conditioned and with good and sufficient sureties as provided by law; and it further appearing that this is a proper cause for the removal to said District Court of the United States;

Now, therefore, it is hereby ordered that this cause be, and the same hereby is, removed to said District Court of the United States for Porto Rico, and the Clerk of this Court is hereby directed to make up the record in the same for transmission to said Court forthwith, or as soon as the same may be demanded by said defendant or her attorney.

Done and ordered at San Juan, this 29th day of September, A. D. 1911.

[SEAL.] (Firmado) FELIX CORDOVA DAVILA,
Judge.

Certifico:
(Firmado) A. MARIN MARIEN,
Secretario.

Attest:
A True Copy.
Signed and Sealed, October 6th, 1911.
(Signed) A. MARIN MARIEN.
Secretary Dist. Court.

82 In the District Court of the United States for Porto Rico, Sitting at San Juan.

Law. No. —.

FRANK F. HARDING, Plaintiff,
vs.
AMY B. ZIMMERMANN, Defendant.

Amendment to Complaint.

Now comes the plaintiff herein by his attorney H. H. Scoville and asks leave of the Court to amend his complaint by rewriting paragraph V. thereof in the following form to-wit:

V.

That the plaintiff contributed to said business in the way of capital Two Thousand Dollars ($2,000); that the profits thereof during the period in which the plaintiff had charge of the same was One Thousand Three hundred and Seventy-eight Dollars and seventy-five cents ($1,378.75); that the services of the plaintiff for the six months during which he was in charge thereof were reasonably worth the sum of One Thousand Five Hundred Dollars ($1,500); that the plaintiff's interest and option upon the premises in which they were taking said Hotel business was reasonably worth the sum of Four Thousand Two Hundred Dollars ($4,200); that the plaintiff's good will in said business was re-sonably worth the sum of Three Thousand Five Hundred Dollars ($3,500); and that the plaintiff's interest in an option to buy said premises on or before the termination of said lease was reasonably worth the sum of
83 of Four Thousand Dollars ($4,000) making a total of Sixteen Thousand Five hundred and Seventy-eight Dollars and Seventy-five cents ($16,578.75).

For the reason stated the plaintiff prays that the defendant be adjudged to pay to the plaintiff said sum of Sixteen Thousand Seven Hundred and Thirty-seven Dollars and Seventy-five cents ($16,737.75) together with the costs incurred in this suit and attorneys' fees and the plaintiff will ever pray.

(Signed) H. H. SCOVILLE,
Attorney for Plaintiff.

San Juan, P. R., Nov. 8th 1911.

84 In the District Court of the United States for Porto Rico.

No. 831, San Juan.

FRANK F. HARDING
vs.
AMY B. ZIMMERMANN.

Comes now the defendant herein, by her attorney N. B. K. Pettingill, and move- the Court to strike from the amended paragraph V. of plaintiff's complaint all the items of damages alleged and claimed, except the amount of capital contributed and the profits during the period in which the plaintiff had charge, as alleged, upon the following grounds, to wit:

(1) The item of $1,500 for the services of plaintiff because the same is not warranted by any allegation of the complaint and is inconsistent with the terms of the contract of partnership as therein set forth and with the claim of profits which precedes it.

(2) The item of $4,200 as the value of plaintiff's interest in the "lease and option" upon the Hotel premises, for the reasons set forth as to the preceeding item and for the additional reason that such damage is remote, speculative and dependent upon future contingencies.

(3) The item of $3,500 as the value of the good will of said business, for the reason that such damage is remote; speculative and incapable of definite ascertainment.

(4) The item of $4,000 as the value of plaintiff's interest in an option to buy said premises, because the same is not warranted by any allegation of the complaint, is inconsistent with the terms
85 of the contract of partnership as therein set forth, and is identical with a previous item of damage claimed.

(Signed) N. B. K. PETTINGILL,
Attorney for Defendant.

86 In the District Court of the United States for Porto Rico.

No. 831. Law.

FRANK F. HARDING
vs.
AMY B. ZIMMERMANN.

The motion to strike filed by the defendant in the above entitled cause, is heard by the Court, and after being duly considered is sustained, and the plaintiff is given until Friday, November 17th, 1911, to amend his complaint, to which ruling of the Court, the plaintiff by his Attorneys H. H. Scoville & H. P. Leake duly excepts.

87 In the District Court of the United States for Porto Rico.

No. 831. Law.

FRANK HARDING
vs.
AMY B. ZIMMERMANN.

Now comes the plaintiff herein, by his attorneys Willis Sweet and H. H. Scoville, and with leave of the Court, files his motion to dismiss the above entitled cause, and thereupon, it is Ordered that same be, and it hereby is dismissed without prejudice to plaintiff's costs.

And I further certify that no other evidence was introduced by either party having any relation to the above suit at law.

PAUL CHARLTON,
Judge of said Court.

88 In the District Court of the United States for Porto Rico.

(Filed July 9, 1912.)

No. 842. Equity.

FRANK HARDING, Complainant,
vs.
AMY B. ZIMMERMAN, et al., Respondent.

Order.

On the coming in of the report of John L. Haas, the Special Master of this Court heretofore appointed herein, the parties of this suit being present in person and by counsel, and the Court being fully advised in the premises:

It is hereby ordered, adjudged and decreed that the bid of Frank Harding for the properties covered by the order herein, to wit: the sum of $2,500.00 in cash be, and the same hereby is, confirmed, and the said John L. Haas, as such Special Master, is hereby ordered and directed to turn over forthwith to said Frank Harding, as such purchaser, all the properties heretofore ordered to be sold, upon the payment to him of the amount of said bid of $2,500.00, of which the sum of $1,000.00 is to be charged against said Harding upon any amounts found to be due him upon the stating of the final account between him and the said Zimmerman.

It is agreed by counsel for all parties hereto, and the Court consents to such stipulation, and the amount of cash deposited
89 with Jacob Axtmayer and Anna Axtmayer, his wife, in accordance with the terms of the lease between said Axtmayers

and the other parties hereto, to wit, on this date, the sum of $2,562.00, shall remain in the custody and possession of the said Jacob Axtmayer and Anna Axtmayer, his wife, pending a final adjudication herein, to be subject to the further order of the Court; provided, however, that said agreement is subject to the further stipulation made by counsel in open court, that said cause shall be speeded on appeal and submitted under Rule 20 of the Supreme Court upon brief without argument, within the ninety days of October, 1912, term, as provided in said Rule.

Dated San Juan, July 9, 1912.

(Signed) PAUL CHARLTON, *Judge.*

Harding & Zimmermann.

Balance Sheet.

August 8th, 1911.

Assets.			*Liabilities.*		
Cash		1,591.39	Bills Payable		500.00
Deposits		2,873.33	Accounts payable: Exhibit A, Schedule 3		1,268.53
Axtmayer	$3,000.00		Total Liabilities		1,768.53
Deduct: Proportionate rent of furniture Feb. 1/11 to Aug. 8/11 inclusive	156.67		Capital accounts:		
		$2,843.33	F. F. Harding	2,000.00	
P. R. Ry. Power & Light Co.		30.00	A. B. Zimmermann	2,000.00	
			Total Capital	4,000.00	
Inventories		1,300.00	Undivided profits: (Exhibit A, Schedule 1)	4,494.39	
House Supplies (Est'd)	100.00		Total Capital and Undivided Profits		8,494.39
Bar Supplies (")	100.00				
Furniture, Silver, Linen, Crockery, etc., estimated	1,100.00				

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Advance payments		469.15
Rent	440.00	
Interest	29.15	
Loan accounts		500.00
F. F. Harding	500.00	
Accounts receivable: Exhibit A, Schedule # 2		972.64
F. F. Harding: (Current Account) Exhibit A, Schedule # 4		1,959.56
A. B. Zimmermann (Current Account) Exhibit A, Schedule # 5		596.85
Total assets		10,262.92

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91 Harding & Zimmermann.

Balance Sheet.

December 31st, 1911.

Assets.			*Liabilities.*		
Cash		2,003.12	Accounts Payable, Exhibit "B," Schedule # 3		4,021.58
In Bank	1,789.03		Total Liabilities		4,021.58
In Office	214.09				
Deposits		2,755.00	Capital accounts:		
Axtmayer	3,000.00		F. F. Harding	2,000.00	
Deduct: Proportionate rent of furniture, viz: Feb. 1/11 to Aug. 8/11	156.67		A. B. Zimmermann	2,000.00	
Aug. 8/11 to Dec. 31/11	118.33		Total Capital		4,000.00
		275.00	Undivided profits:		
Net Axtmayer		2,725.00	Period Feb. 1/11 to Aug. 8/11: (Exhibit A, Schedule 1)	4,494.39	
P. R. Ry. Power and Light Co.		30.00	Period Aug. 8/11 to Dec. 31/11: (Exhibit B, Schedule 1)	849.61	
Inventories		3,189.79			

House Supplies (actual)	312.28	
Bar Supplies (")	729.35	
Furniture, Silver, Linen, Crockery, etc. (Estimated)	2,148.16	
Accounts receivable: Exhibit B, Schedule # 2		2,107.82
F. F. Harding (Current Account) Exhibit B, Sched. # 4		2,459.56
A. B. Zimmermann (Current Account) Exhibit B, Sched. # 5		850.29
Total Assets		13,365.58

Total Undivided Profits...	5,344.00	
Total Capital and Undivided Profit..		9,344.00
		13,365.58

92 In the District Court of the United States for Porto Rico.

(Filed July 17, 1912.)

FRANK F. HARDING
vs.
AMY B. ZIMMERMAN.

Final Decree.

This Court having by its order herein, dated May 18th last, found and decreed that the attempted dissolution by the defendant Zimmerman, on August 8, 1911, of the partnership then existing between her and complainant was unwarranted and ineffectual, and that said partnership continued to exist until dissolved by said order as of that date, and having further by said order directed the Sale of all the assets of said partnership, including the Hotel Eureka-Miramar as a going concern, and having appointed John L. Haas as Special Master to make said sale, and said Special Master having made his report of sale, which has been confirmed, and having also obtained and filed a full report of the condition and results of said business, made by the auditor heretofore appointed herein, this cause now comes on for hearing upon the question of a final accounting and distribution between the parties.

And thereupon, the Court, being fully advised in the premises, finds that the complainant and defendant Zimmerman were
93 equal partners in said business, and were to share the profits and losses thereof equally; that the capital contributed to the firm was $2,000.00 each, and that said business covering the full period to the date of its dissolution by the Court was conducted at a profit; that at the date the decree of dissolution was entered — this Court, the total assets were $14,478.17, to which is to be added the following items: Charge directed to be made against complainant Harding, by the order of May 18th last, $618.00; amount to be charged against defendant Zimmerman on account of reduction in salary (one third of $2825.00), $941.66, making a grand total of $16,037.83; and that its liabilities were $1491.39, resulting in net assets of $14,546.44.

The Court further finds that, as a result of these legal proceedings, there have been incurred certain items of expense, to wit: Fees of Special Master, $600.00; fees of the auditor $750.00; loss under the management of Special Master, $675.28 court costs $150.00, making a total of $2,175.28. As a result of which, it appears that the assets now remaining for distribution amount to $12,371.16, or the sum of $6,185.58 to each of the partners.

The court further finds from the evidence and the report of the auditor that the complainant Harding has heretofore withdrawn from said assets a net amount of $3,177.56, and that the defendant Zimmerman has withdrawn a net amount of $1,306.36, and that there accordingly remains due to said partners, the respective

amounts of $3,008.02 to the complainant Harding, and $4,879.22 to the defendant Zimmerman.

It is, therefore, hereby ordered, adjudged and decreed that out of the assets of the partnership there be paid to the respective
94 partners the said sum of $3,008.02 to said complainant Harding and $4,879.22 to said defendant Zimmerman, and it appearing that of said assets the sum of $805.38 is in the form of accounts receivable, the said Special Master is not fully discharged, but is continued for the purpose of collecting said accounts, the proceeds thereof to be equally divided between said partners as the same shall be realized, and credited upon the amounts respectively due them, as aforesaid.

It is hereby further ordered, adjudged and decreed that the said sum of $2,175.38, above stated as the items of expense incurred in this suit, is to be charged against said partners in the proportion of one-third against the complainant Harding and two-thirds against the defendant Zimmerman, with the exception that an item of $109.52, a part of the auditor's fees, is to be wholly paid by complainant Harding.

The Court reserves the right to make any further orders in execution of this decree.

San Juan, P. R., July 17th, 1912.

(Signed) PAUL CHARLTON, *Judge.*

95 In the District Court of the United States for Porto Rico.

(Filed July 17, 1912.)

No. 842.

FRANK F. HARDING
vs.
AMY B. ZIMMERMAN et al.

Petition of Appeal.

The defendant Amy B. Zimmerman, conceiving herself aggrieved by the order and decree of this court entered herein on the 18th day of May, 1912, whereby it was decreed, among other things, that a partnership still existed between the complainant and this defendant herein and that the same be dissolved as of that date, as well as by the decree entered herein on this 17th day of July, 1912, whereby it is decreed, among other things, that complainant is entitled as a partner to the one-half of the profits found to have been realized from the business of the "Hotel Eureka-Miramar" up to the said 18th day of May, 1912, the delivery of the same ordered to be made to him by the Special Master of this Court, does hereby appeal from said orders and decrees to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith; and she prays that her petition of appeal may be allowed and may operate as a supersedeas upon the giving of a bond in a sum to be

fixed by the court, and that a transcript of the record and
96 material proceedings herein upon which said orders and decrees were made, pursuant to the præcipes to be filed by the respective parties hereto, duly authenticated, may be transmitted to the said Supreme Court of the United States, according to law.

Dated this 17th day of July, 1912.

(Signed) N. B. K. PETTINGILL,
Counsel for Defendant Amy B. Zimmerman.

97 In the District Court of the United States for Porto Rico.

(Filed July 17, 1912.)

No. 842.

FRANK F. HARDING
vs.
AMY B. ZIMMERMAN et al.

Order Allowing Appeal.

The defendant Amy B. Zimmerman, by her counsel N. B. K. Pettingill, having on this 17th day of July, 1912, filed her petition for appeal and supersedeas in this cause, it is now hereby ordered, in open court at the same Term at which the orders and decrees appealed from were entered, that the appeal prayed for to the Supreme Court of the United States be, and the same hereby is, allowed; and that a certified transcript of the record and all proceedings herein, or such as counsel for the respective parties by their præcipes may require, be transmitted to said Supreme Court of the United States as provided by law.

It is further hereby ordered that the bond on appeal to be given by said defendant be fixed in the sum of Two Thousand Dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal; and that, upon the filing and approval
98 of said bond, the execution of that part of the decree providing for the distribution of the funds on hand as between the parties hereto be stayed and suspended until the determination of said appeal.

Done and ordered in open Court at San Juan this 17th day of July, A. D. 1912.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

99 In the District Court of the United States for Porto Rico.

(Filed July 17, 1912.)

No. 842.

FRANK F. HARDING
vs.
AMY B. ZIMMERMAN et al.

Bond on Appeal.

Know all men by these presents, that we, Amy B. Zimmerman, as principal, and Frederic Val Espinosa and R. H. Todd, as sureties, are held and firmly bound unto Frank F. Harding, his executors, administrators or assigns, in the full and just sum of Two Thousand Dollars, for the payment whereof, well and truly to be made, we do bond ourselves, our heirs, executors administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of July, A. D. 1912.

Whereas lately at a session of the District Court of the United States for Porto Rico, in a suit pending in said Court between the said Frank Harding, complainant, and said Amy B. Zimmerman and Jacob Axtmayer and Anna Axtmayer, his wife, respondents, a decree was rendered against said Amy B. Zimmerman, and the said Amy B. Zimmerman having obtained from said Court an order allowing her an appeal to the Supreme Court of the United States to reverse the decree of the aforesaid Court, in which said order the appeal bond of said defendant was fixed at the amount above named; Now, the condition of this obligation is such that if the said Amy B. Zimmerman shall prosecute her said appeal to effect and shall answer all damages and costs that may be awarded against her, if she fails to make her plea good, then this obligation is to be void; otherwise to remain in full force and effect.

(Signed) AMY B. ZIMMERMAN. [SEAL.]
[SEAL.] (Signed) FEDERIC VALL ESPINOSA.
(Signed) R. H. TODD. [SEAL.]

Witness:
L. A. GROSS (Signed).
F. FANO "

Approved July 17, 1912.
(Signed) PAUL CHARLTON, *Judge.*

100 UNITED STATES OF AMERICA,
District of Porto Rico:

Personally appeared before me, the undersigned authority, the above named Frederic Val Spinosa and R. H. Todd, sureties who signed the foregoing bond and after being severally sworn each for

himself deposes and says that he is worth in visible property, over and above all debts and legal obligations the sum above named as the penalty of said bond.

(Signed) FREDERIC VALL SPINOSA.
" R. H. TODD.

Sworn to and subscribed before me this 17th day of July, 1912.

(Signed) RAFAEL GUILLERMETY,
[SEAL.] *Clerk Dist. Court U. S. for P. R.*

101 In the District Court of the United States for Porto Rico.

Filed July 17, 1912.

No. 842.

FRANK F. HARDING
vs.
AMY B. ZIMMERMAN et al.

Assignment of Errors.

Comes now Amy B. Zimmerman, one of the defendants in the above entitled cause, and files the following assignment of errors upon which she will rely on the appeal to the Supreme Court of the United States from the orders and decrees of May 18 and July 17, 1912, made by this court in this cause.

I.

In holding that the partnership between complainant and defendant Zimmerman was not dissolved on the 8th day of August, 1911, but continued until dissolved by the order of the Court.

II.

In holding that complainant had not made his election by the bringing of the previous suit at law for damages to recognize the dissolution of the partnership on said 8th day of August, 1911, and had not waived any right to assert that said partnership still existed.

102 III.

In failing to sustain the special defence based upon the doctrine of election of remidies and set forth in paragraph XVI of her answer to complainant's bill of complaint.

IV.

In awarding to the complainant any part of the profits of said hotel business or any part of the capital invested therein subsequent to said 8th day of August, 1911.

V.

In not rendering its decree against the complainant in said suit, dismissing his said bill of complaint for want of Equity.

And in order that the foregoing assignment of errors may be and appear of record, the defendant Amy B. Zimmerman presents the same to the court and prays that such disposition be made thereof as in accordance with law and the statute of the United States in such cases made and provided; and said defendant prays a reversal of said orders and decrees made by said court in so far as the terms thereof are prejudicial to the interest of the said defendant.

(Signed) N. B. K. PETTINGILL,
Counsel for Defendant Amy B. Zimmerman.

103 In the District Court of the United States for Porto Rico.

#842. Equity.

FRANK F. HARDING
vs.
AMY B. ZIMMERMAN et al.

I, Rafael Guillermety, Clerk of the District Court of the United States for Porto Rico, do hereby certify *that* the foregoing typewritten pages numbered 1 to 102, inclusive, to be a true and correct copy of certain proceedings in the above entitled cause, as called for by the præcipe filed by the counsel for the appellant, copy of which præcipe is hereto attached.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 22nd day of August, A. D. 1912.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY, *Clerk.*

104 [Endorsed:] No. 842. In the District Court of the United States for Porto Rico. Frank Harding vs. Amy B. Zimmerman et al. Transcript of Record.

Endorsed on cover: File No. 23,346. Porto Rico D. C. U. S. Term No. 771. Amy B. Zimmerman, appellant, vs. Frank F. Harding. Filed September 3, 1912. File No. 23,346.

(Filed Dec. 4, 1912.)

In the District Court of the United States for Porto Rico.

No. 842. Equity.

FRANK F. HARDING, Complainant,

vs.

AMY B. ZIMMERMAN et al., Defendants.

Petition of Appeal.

The complainant, Frank F. Harding, conceiving himself aggrieved by the order and decree of this court entered herein on the 18th day of May, 1912, whereby it was decreed, among other things, that a partnership still existed between the defendant Amy B. Zimmerman and the complainant herein and that the same be dissolved as of that day, as well as by the decree entered herein on the 17th day of July, 1912, whereby it is decreed among other things, that defendant Amy B. Zimmerman is entitled as a partner to the one-half of the profits found to have been realized from the business of the "Hotel Eureka-Miramar" up to said 18th day of May, 1912, and delivery of the same ordered to be made to her by the Special Master of this court, does hereby appeal from said orders and decrees to the Supreme Court of th United States for the reasons specified in the assignment of errors filed herewith; and he prays that his petition of appeal may be allowed upon the giving of a bond for costs in a sum to be fixed by the court, and that a transcript of the record and material proceedings herein upon which said orders and decree were made, pursuant to the præcipes to be filed by the respective parties hereto, duly authenticated, may be transmitted to said Supreme Court of the United States, according to law.

Dated this 4th day of Nov., 1912.

(Signed) WILLIS SWEET.
(Signed) H. H. SCOVILLE,
Counsel for Complainant.

(Filed Dec. 4th, 1912.)

In the District Court of the United States for Porto Rico, Sitting at San Juan.

No. 842. Equity.

FRANK F. HARDING, Complainant,

vs.

AMY B. ZIMMERMAN and JACOB and ANNA AXTMAYER, Defendants.

Assignment of Errors.

Comes now the complainant and files the following Assignment of Errors upon which he will rely in his appeal from the decree made

by this Honorable Court on the 18th day of May, 1912, and the final order entered on the 17th day of July, 1912.

I.

The Court erred in holding that the defendant Amy B. Zimmerman was entitled to participate in the profits of the partnership of Harding & Zimmerman after the 8th day of August, 1911.

II.

The Court erred in not holding that the defendant Amy B. Zimmerman had forfeited all her rights and interests in said partnership by attempting to appropriate to her own use all of the benefits and profits thereof.

III.

The Court erred in allowing and awarding to the defendant Amy B. Zimmerman salary from the 8th day of August, 1911, to the date of the dissolution of said partnership under the decree of the Court.

IV.

The Court erred in holding that the complainant should be charged with any amount whatever on account of bar receipts as set out in said decree.

In order that the foregoing Assignment of Errors may be and appear of record, complainant presents the same to the Court, and prays that such disposition be made thereof as in accordance with law and the statutes of the United States in such case made and provided. And said complainant prays the reversal of said decree and orders made by said Court in so far as the terms thereof are prejudicial to the interests of said complainant.

(Signed) H. H. SCOVILLE,
(Signed) WILLIS SWEET,
Counsel for Complainant.

(Filed Dec. 4th, 1912.)

In the District Court of the United States for Porto Rico.

No. 842. Equity.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN et al., Defendants.

Order Allowing Appeal.

Upon motion of Willis Sweet and Hector H. Scoville, counsel for the complainant herein, and on behalf of the petition of the complainant in the above entitled cause for an order allowing appeal, together with an assignment of errors, it is

Ordered that an appeal be, and is hereby allowed, to the Supreme Court of the United States from the decrees and orders of this court dated the 18 day of May, 1912, and the 17th day of July, 1912, respectively. The amount of the cost bond is fixed in the sum of two hundred and fifty Dollars ($250.00), and it is ordered that a certified transcript of the record and proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

Done and ordered in San Juan, Porto Rico, this 4th day of Dec. A. D. 1912.

[Seal United States District Court for the District of Porto Rico.]

(Signed) PAUL CHARLTON, *Judge.*

(*Appeal Bond. Filed Dec. 10th,* 1912.)

Know all men by these presents, That we, Frank F. Harding, as principal, and Henry W. Dooley and N. P. Nichols, as sureties, are held and firmly bound unto Amy B. Zimmerman in the full and just sum of Two hundred fifty dollars, to be paid to the said Amy B. Zimmerman, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of December, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the District Court of the United States for Porto Rico, holden on the second Monday in April, 1912 in a suit depending in said Court, between Frank F. Harding, complainant, and Amy B. Zimmerman and Jacob and Ana Axtmaver defendants a decree was rendered against the said Frank F. Harding as to allowance of salary to def't Zimmerman from assets of partnership of Harding & Zimmerman and declaring said Zimmerman to be entitled to one half of the profits of said partnership, and the said Frank F. Harding having appealed from said decree

Now, the condition of the above obligation is such, That if the said Frank F. Harding shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) F. F. HARDING. [SEAL.]
(Signed) HENRY W. DOOLEY. [SEAL.]
(Signed) N. P. NICHOLS. [SEAL.]

Sealed and delivered in presence of:
(Signed) H. H. SCOVILLE.
(Signed) C. BURSIAN.
(Signed) O. I. GOBLE.
Witnesses as to Signatures of N. P. Nichols & H. W. Dooley.

Approved by:
(Signed) PAUL CHARLTON,
Judge of the District Court of the United States for Porto Rico.

(Filed Dec. 5th, 1912.)

In the District Court of the United States for Porto Rico.

Equity. No. 842.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN et al., Defendants.

Stipulation.

Now come the parties hereto by their respective counsel, N. B. K. Pettingill for the defendant Amy B. Zimmerman, and H. H. Scoville and Willis Sweet counsel for the complainant, and

Stipulate that the record on the cross-appeal of the complainant Frank F. Harding shall be constituted by the record on the original appeal heretofore prepared by defendant Zimmerman, together with the transcript containing the formal papers presented for the perfection of said cross-appeal, and that the same may be considered as one record upon the consideration of these appeals.

Dated at San Juan, P. R., December 5, 1912.

(Signed) N. P. K. PETTINGILL,
Counsel for Defendant Amy B. Zimmerman.
(Signed) WILLIS SWEET.
(Signed) H. H. SCOVILLE.
Counsel for Complainant Frank F. Harding.

(Filed Dec. 5th, 1912.)

In the District Court of the United States for Porto Rico.

Equity. No. 842.

FRANK F. HARDING, Complainant,
vs.
AMY B. ZIMMERMAN et al., Defendants.

To Rafael Guillermety, Esq., Clerk of the District Court of the U. S. for P. R.:

In the preparation of the transcript of record to be transmitted to the Supreme Court of the United States, upon the appeal taken the 4th day of December, 1912, by the complainant F. F. Harding, you will please include all those parts of the record and proceedings specified below, showing the date of filing of each, together with such other portions as may be properly indicated by counsel for the defendant Amy B. Zimmerman.

1. Petition of Appeal filed December 4, 1912.
2. Assignment of Errors filed December 4, 1912.

3. Order allowing appeal, entered Dec. 4, 1912.
4. Cost Bond.
5 Stipulation filed December 5, 1912.
6. Copy of this Præcipe.
7. Copy of other præcipes, if any, filed by counsel for other parties with the parts of the record indicated therein.

(Signed) WILLIS SWEET,
(Signed) H. H. SCOVILLE,
Counsel for Complainant.

Service of copy accepted this 5th day of December, 1912. The Clerk of the Court is hereby notified that no further præcipe will be filed on the part of the defendant Amy B. Zimmerman.

(Signed) N. B. K. PETTINGILL,
Counsel for Defendant Amy B. Zimmerman.

In the District Court of the United States for Porto Rico.

No. 842. Equity.

FRANK F. HARDING
vs.
AMY B. ZIMMERMAN et al.

I, Rafael Guillermety, Clerk of the District Court of the United States for Porto Rico, do hereby certify *that* the foregoing typewritten pages numbered 1 to 8 inclusive, to be a true and correct copy of certain proceedings in the above entitled cause, as called for by the præcipe filed by the counsel for the appellant, copy of which præcipe is hereto attached.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court this 11th day of December, A. D. 1912.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY, *Clerk.*

[Endorsed:] No. 842. Equity. In the District Court of the United States for Porto Rico. Frank F. Harding vs. Amy B. Zimmerman et al. Appeal Record. Vide No. 771.

Endorsed on cover: File No. 23,346. Porto Rico D. C. U. S. Term No. 771. Amy B. Zimmerman, appellant, vs. Frank F. Harding. Filed September 3, 1912. File No. 23,469. Term No. 894. Frank F. Harding, appellant, vs. Amy B. Zimmerman. Filed December 21st, 1912. File Nos. 23,346 and 23,469.

Office Supreme Court, U. S.
FILED.
JAN 3 1913
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 771.

AMY B. ZIMMERMAN, APPELLANT,

vs.

FRANK F. HARDING.

No. 894.

FRANK F. HARDING, APPELLANT,

vs.

AMY B. ZIMMERMAN.

BRIEF FOR APPELLANT IN No. 771.

N. B. K. PETTINGILL,
Counsel for Appellant Amy B. Zimmerman.

(23,346 and 23,469)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 771.

AMY B. ZIMMERMAN, APPELLANT,

vs.

FRANK F. HARDING.

AND

No. 894.

FRANK F. HARDING, APPELLANT,

vs.

AMY B. ZIMMERMAN.

CROSS-APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR APPELLANT IN No. 771.

Statement of the Case.

On the 1st day of December, 1911, the cross-appellant Harding filed his bill in equity in the District Court of the United States for Porto Rico against the appellant Zimmer-

man and two other defendants, Jacob Axtmayer and wife, for the purpose of dissolving a partnership alleged then to exist between appellant and cross-appellant, the other two defendants being joined simply because they were the owners and lessors of the property which was the subject of the partnership business.

As the controversy before this court affects only the two parties who were members of the partnership, and as cross-appeals are to be considered, it will conduce to clearness and simplicity of statement to designate the two parties here involved as complainant and defendant respectively as they were designated in the court below, and to designate the remaining two defendants not interested in the present controversy as "the owners."

The bill of complaint, as finally amended, in brief alleged (Printed Record, pp. 2-11) that in January, 1911, complainant arranged with the owners for a two years' lease from February 1 following of the property and business known as the "Hotel Eureka-Miramar," at San Juan, upon certain terms and conditions therein specified, one of which was that he must obtain some one to become lessee with him as guarantor acceptable to said owners; that, because of said condition, as well as because he could not then command the necessary capital himself, he looked about for an associate and entered into an arrangement with defendant, who was finally accepted by the owners as co-lessee with himself; that on said 1st day of February this arrangement was carried out by the execution of a lease of said property and business from said owners in their joint names for a period of two years at a rental of $600 per month, the details of said conditions being immaterial, and that upon such execution of the lease said lessees, complainant and defendant, entered into a partnership agreement, for a term equivalent to the life of the lease, to contribute equal amounts to the partnership capital and to carry on the business as equal partners.

The bill proceeds to allege in some detail how the capital was raised and how the business was entered upon and conducted by said partners jointly and was from the first financially successful; then that in May, 1911, defendant went to the States on vacation, returning at the end of June, after which and early in July complainant in his turn departed for the same purpose, each partner having full charge of the business during the absence of the other, as had been previously agreed; that after her return and before the departure of complainant defendant had examined the accounts and transactions made during her absence, and complainant left under the impression that she was wholly satisfied with his conduct of the business during that time, but that on the 8th day of August, 1911, he received a letter from her announcing that she had dissolved the partnership between them, at which time she also inserted a notice in the newspapers that she would in the future conduct the business on her own account; that when complainant returned to San Juan in September, 1911, he found he had been ousted from his interest in said business so far as it was within defendant's power to do so, but he remained subject to all the liabilities incurred by virtue of the partnership, and that he was afterwards notified by Jacob Axtmayer that the owners held him responsible on the lease and would still hold him liable for the execution of every obligation incurred under it. Further allegations were of the great value of the business, its mismanagement and the conversion of the assets by defendant, the near approach of the most profitable season of the year, and the right of complainant to be restored to his privileges as a partner; yet the averment was made that, after what had occurred, it would be neither desirable nor profitable for him to exercise those rights, by reason of which he sought the other relief set forth in the bill.

The prayer was that the partnership be dissolved and an accounting be had; that defendant pay to complainant any

amount so found to be due; that a receiver be meantime appointed to take charge of the partnership assets and business and to conduct the same until the partnership affairs should be liquidated; and that defendant, on account of her wrongful acts in attempting to appropriate to her own use all the assets of the partnership and complainant's rights in the lease, which acts had rendered it impossible for the parties to carry out the terms of the partnership and the lease, be decreed to have forfeited her rights in said lease and the owners be ordered to permit complainant to associate with himself some other person agreeable to them as contemplated by the lease, and for general relief.

The separate answer of defendant Zimmerman to the bill was at once filed (pp. 12-15) in order that it might be used as a defense upon the hearing of the application for a receiver. This answer admitted in substance the allegations of the bill regarding the formation of the partnership and the making of the lease with the owners; denied that defendant had opportunity to investigate the partnership accounts after her return and before complainant left on his vacation, and asserted that the books were in such shape as made such investigation impossible; admitted the notification sent by her dissolving the partnership and her assumption of control of the business in her own right, and made six specifications of violation of partnership obligations by the complainant which justified such dissolution. In addition, the last paragraph of her answer set up a separate defense in the following terms (p. 16):

> "This defendant further answering alleges that in the month of September, 1911, complainant began his action at law against this defendant in the Insular District Court for the Judicial District of San Juan, basing his cause of action upon the same contract of partnership now set up in his present bill of complaint and alleging that said contract was entered into on the first day of February, 1911, and remained in force until about the 8th day of July,

1911, on which date this defendant voluntarily declared said contract rescinded, and plaintiff claimed damages as for breach of a contract rescinded and ended; that said action at law was by this defendant duly removed into this court on the law side thereof and set for trial therein, but was thereafter voluntarily dismissed without prejudice at his costs; and that complainant thereby made his election to accept and consider the action of this defendant in so terminating said contract of partnership as a rescission and cancellation thereof, and to hold this defendant responsible in damages therefor, so far as the law would allow, thus estopping himself from claiming or contending that said contract is still existent and in force or that he has any rights in or to said leasehold or the business carried on thereunder. And this defendant claims the same benefit from this defense as though she had pleaded it in bar to said bill of complaint."

The application for the appointment of a receiver came on to be heard six days after the filing of the bill and was by the court denied (pp. 17, 18), but the order further provided that defendant should file a bond for $3,500 to save defendant "harmless from any obligations that he may be caused on account of his signature to the lease," and an auditor was appointed to state an account, who afterward filed reports (pp. 18-36). The opinion of the court (pp. 40-45) and the preliminary decree (pp. 45-6), entered the same day, show that oral evidence was taken and, as a result thereof, the trial court found that defendant had no legal ground for dissolving the partnership on August 8, 1911; hence it had continued to exist until the date of the decree. The decree ordered it dissolved and all the assets and business in the possession of defendant sold at public sale by a special master therein appointed, who was ordered to continue the business until the date of sale and to sell it as a going concern, to state an account of the business from the date of the auditor's account to the day of sale, and to

charge against the complainant a sum of $618 which was found unaccounted for by him from the bar receipts.

The sale was had and the property and business sold to the complainant (p. 54); whereupon a final decree of distribution was entered (p. 60) in consonance with the principles set forth in the preliminary decree. From certain provisions of these decrees both parties have appealed, the grounds of complaint of the original appellant, defendant below, being specified (p. 64) in the following

Assignment of Errors.

1. In holding that the partnership between complainant and defendant Zimmerman was not dissolved on the 8th day of August, 1911, but continued until dissolved by the order of the court.

2. In holding that complainant had not made his election by the bringing of the previous suit at law for damages to recognize the dissolution of the partnership on said 8th day of August, 1911, and had not waived any right to assert that said partnership still existed.

3. In failing to sustain the special defense based upon the doctrine of election of remedies and set forth in paragraph XVI of her answer to complainant's bill of complaint.

4. In awarding to the complainant any part of the profits of said hotel business or any part of the capital invested therein subsequent to said 8th day of August, 1911.

5. In not rendering its decree against the complainant in said suit, dismissing his said bill of complaint for want of equity.

ARGUMENT.

The question may suggest itself preliminarily whether appellant Zimmerman is within her rights in taking her appeal alone, without joining her codefendants Axtmayer as appellants. But the character of the relief granted by the decree and of the questions raised by the assignment of errors above quoted so plainly shows that the matters here in controversy do not affect said codefendants, but that such questions are "severable in fact and in law" within the authorities, that the mere citation of those precedents seems sufficient.

Day *vs.* Washburn, 23 How., 309.
City Nat. Bank *vs.* Hunter, 129 U. S., 557, 578.
Gilfillan *vs.* McKee, 159 U. S., 303, 312.

Passing to the merits, the contentions involved in the errors above assigned are in effect only two.

First, that the bringing of the previous suit at law, as set forth in paragraph XVI of defendant's answer and proven by the unchallenged record of that suit, was an election of remedies on the part of complainant which constituted a good defense to the subsequent bill in equity to which it was pleaded, whatever may have been the intrinsic merits of that bill.

Second, that under the law applicable to such partnerships defendant had the right to declare a dissolution, and that under the pleadings and proofs her action in so declaring was justified.

I.

Defense Based Upon Election of Remedies Should Have Been Sustained.

We enter upon the question of election of remedies first because, if that defense was well founded, it was decisive of this case and the decree should have been in favor of defendant.

The previous suit between the same parties, upon which this defense was based (par. XVI of answer, p. 16), had been begun by complainant in the appropriate insular court and removed by the defendant into the court below; and the entire record of that suit was introduced in evidence by the defendant in the trial of this case, as is certified in the present record (p. 49). The material parts of that record are transcribed into the present record (pp. 49-54), and the court below further certifies that "no other evidence was introduced by either party having any relation to said suit (p. 54).

Examining the original complaint in that suit (pp. 49-51), it appears that on the 16th day of September, 1911, the date said complaint was filed, the complainant there took the position that defendant had on the 8th day of July (an inadvertent mistake for August) previous "declared said contract rescinded," although without legal excuse, and that, because of such wrongful rescission, "the defendant owes to the plaintiff * * * the sum of $12,978.75 and also is indebted to him for one-half of the profits which said hotel business would produce during the one year and six months remaining before the contract ends, which would be the sum of $3,750." And complainant there asked judgment for said two amounts *as damages*. An amendment to the complaint, made after removal (p. 52), merely makes a more detailed statement of the items of damage claimed.

That suit was therefore, distinctly and essentially, a suit

at law for damages alleged to have resulted from the wrongful breach of a *terminated* and rescinded contract. It recognized the contract as terminated by the act of the defendant, whether rightful or wrongful, because the damages *there claimed* covered *all* the damages to which complainant could ever be entitled, as well as because it claimed a fixed sum as the *estimated damages* for the *loss* of the half of the future profits of the business. Had it been intended to recognize the contract as still existent, damages could have been claimed only to the beginning of the suit or, at most, to the time of trial. As was said by this court in a case involving the same principle, though differing in its facts:

> "The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the *right to elect* to treat the contract *as absolutely* an *finally broken* by the defendant; to maintain his action, once for all, as for a *total breach* of the entire contract; and to recover all that he would have received in the future as well as in the past, if the contract had been kept."
>
> Pierce *vs.* T. C. I. & R. Co., 173 U. S., 1. 16.

In the discussion of that case leading up to the quoted statement this court also quoted with approval the following expression of views by the New York court:

> "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach *put an end to it*, and gave the plaintiff a right to recover an *equivalent in damages*, which equivalent was the present value of her contract."
>
> Schell *vs.* Plumb, 55 N. Y., 592, 597

Examining in turn the bill of complaint herein to see whether its allegations and object are consistent or inconsistent with the suit at law, it is seen that its allegations and prayer are consistent only with the continuing existence of the contract of partnership. It prays for a receivership as preliminary to the future dissolution of the partnership, for a decree of dissolution as one of the results of the suit, and for an accounting of actual profits as distinguished from the equivalent of estimated profits as damages.

Hence we say that complainant's attempt to assume the position now taken in this equity suit is inconsistent with the position taken by him in his suit at law previously brought; that the beginning of that suit at law was an *election* on his part as to the remedy he preferred to pursue; and that, having once made his election, he is bound by it and the right to the remedy not chosen is gone. The suit at law for damages "as for a total breach of the entire contract," as this court has said, was necessarily conditioned upon the premise that the "total breach put an end to it," and is wholly inconsistent with, and contradictory to, the premises assumed in the present bill in equity; that the contract was still in existence; that the partnership remained still undissolved, and that complainant was entitled to an accounting of actual profits to the date of such dissolution.

There is no need to go farther than the decisions of this court for an announcement of the law governing election of remedies. In a comparatively recent case the subject was reviewed, with ample citation of authority, and the conclusion was stated as follows:

> "The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, *determines his election* in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."
>
> Robb *vs.* Vos, 155 U. S., 13, 43.

That is, applied to the case at bar, the most unequivocal method of ratifying the effect of the action of defendant in declaring the contract of partnership terminated on the 8th day of August, 1911, was by bringing suit based upon that act as effecting such termination, thus recognizing it as "a total breach of the entire contract." In a very recent case Mr. Justice Holmes has still further clarified its meaning and application:

> "Election is simply what its name imports: a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, 'if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election.' Co. Litt., 145*a*. So a man may ratify or repudiate an unauthorized act done in his name (144 Mass., 452). He may take the goods or the price when he has been induced by fraud to sell (160 U. S., 584). He may keep in force or may avoid a contract after a breach of a condition in his favor (135 Mass., 248)."
>
> Bierce *vs.* Hutchins, 205 U. S., 340, 346.

In that case the doctrine of election was held inapplicable to the facts, because it was held that the party had had no legal choice, no two rights either of which he might have asserted, as the claim first made "was not an election but an hypothesis." But in the case at bar there can be no doubt of complainant's two original rights, between which he had a free choice. Upon receipt of the letter from the defendant announcing the dissolution, he was at liberty to pursue *either* of the courses he afterwards successively attempted; but that was the moment for election—he could not pursue *both*. Neither could he try first one and then the other to see which suited him best or proved more advantageous for the reason already pointed out, that a suit at law for damages involved the recognition of the partnership as terminated, though wrongfully, while the suit in equity would involve the contention, as afterwards actually made, that the

partnership still existed and would continue to exist until dissolved in some other way. In other words, the determination of his course of action involved an *election whether to regard the partnership contract as terminated or continuing.* And by beginning his suit for damages "as for a total breach of the entire contract" he *had elected* to regard that contract as at an end. That election once made was final, all inconsistent remedies were thereby waived, and all he could thereafter recover was *damages* in one or another form.

> "The election to rescind or not to rescind once made is final and conclusive."
>
> Pence *vs.* Langdon, 99 U. S., 578, 582.

> "It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act, and makes the election binding. * * * And the plaintiff having once made an irrevocable election, the title was relinquished or waived, and the present action *is absolutely barred.*"
>
> Frisch *vs.* Wells, 200 Mass., 429.

Moreover, it is further submitted that another decision of this court is conclusive of this whole contention from another angle. That decision is *Karrick vs. Hannaman*, 168 U. S., 328, which also came from a territorial court and in which that court had, as in the case at bar, declared a partner to have wrongfully attempted to dissolve a partnership, formed for a fixed term, by his voluntary act, and had thereupon held that the partnership, legally speaking, was still in existence for the reason that one partner had no power to effect a dissolution of such a partnership without the consent of the other. In other words, the lower court in that case seems to have taken a view of the law identical with that taken by the trial court in the case at bar. In reviewing that holding this court, among other things, said:

> "We are not prepared, therefore, to assent to the opinion of the court below that a partnership for a definite time cannot be dissolved by one partner at his own will, and without the consent of his copartner, within that time; and consequently that the partnership between these parties was not dissolved on February 1, 1888, when the defendant assumed exclusive possession and control of the business and property of the partnership, and excluded the plaintiff from any participation therein" (p. 336).
>
> "A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property is liable, *at the election* of the other partner or his representative, to account for the profits thereof, subject to proper allowances" (p. 337).

These paragraphs, as applied to the facts of that case, seem to us to determine four propositions:

(1) That one member of a partnership for a fixed period *can* at his own will dissolve that partnership and "assume exclusive possession and control of the business." What responsibility such partner may thereby incur, if his action be wrongful, is another question subsequently treated; but the partnership *as a partnership owning assets in common* by such volition of the one partner *ceases to exist*.

(2) That after such a dissolution by the volition of one and against the will of the other, the excluded partner may bring an action at law against the other to make him "respond in damages for the *value of the profits*."

(3) That his right to *maintain* his action at law will depend upon proof that the defendant was first guilty of

a breach of their agreement by his act of dissolution. If the excluded partner had himself been guilty of the first sufficient breach, then the act of the other was not a breach because he had already been relieved of his obligation to continue, and the rights of the excluded partner are fixed as of the moment of the act of dissolution.

(4) That, pending his right of action at law, the excluded partner has also a right to go into equity to compel his partner to recognize the partnership as still existing to the extent of the latter's duty "to *account* for the *profits*"; but this is only a right of election, as the court expressly says, and, that *election once made*, the right to the other remedy is thereby waived.

Hence this decision also recognizes that by a suit at law under such circumstances the end aimed at is the recovery of damages for the breaking of a contract no longer existing, while by a suit in equity the end sought is an "accounting for the profits"—actual profits—of a partnership claimed still in a legal sense to subsist.

It is therefore confidently submitted that the bringing by complainant of his suit for damages, of which the record was introduced in evidence and not controverted, constituted an election on his part to recognize the partnership contract as ended and a waiver of any right other than to claim his damages for the wrongful termination thereof, if such termination were in fact wrongful, and that the proof of the bringing of such suit constituted a good defense to this equity suit, which should have induced the court to enter a decree dismissing the bill on that ground.

Counsel for complainant may advert to the form of dismissal entered in said suit at law at his request as being "without prejudice." But that means without prejudice to the bringing of another suit of the same character or *for the same purpose*, so as to avoid the defense of *res judicata* when

considered as a judgment. It neither has, nor was intended to have, any influence upon the question of election of remedies.

II.

Upon the Merits also Decree Should Have Been for Defendant.

As suggested in opening the argument upon the previous point, the decision of that point in favor of defendant must in itself result in a reversal of the decree appealed from, with directions to enter in its stead a decree for defendant. But even in case this court may find a way to avoid the conclusiveness of that contention, it is still insisted that complainant was not entitled to relief in equity under the law and facts.

If there be any difference between the rights of partners under the local law of Porto Rico to dissolve their partnerships and their rights under the general principles laid down in the decisions of this and other American courts, doubtless the rights of these partners in that regard should be determined according to the local law, as the contract was made there and the partnership business was to be carried on there. And our contention is that the Porto Rican law gave defendant the same right to declare a dissolution of this partnership for a fixed period as was declared to exist in *Karrick vs. Hannaman, supra;* and that under that law she sufficiently justified her action according to the proofs.

1. *The Law of Porto Rico.*

Before discussing that law it may not be out of place to refer to decisions of the Supreme Court of Porto Rico indicating its adherence to the doctrine that, in interpreting the statutes of Porto Rico, the tendency should be wherever

practicable to harmonize their construction with the principles of American law.

Chevremont *vs.* People of P. R., 3 P. R. Rep., 215, 245.

Diaz *vs.* San Juan L. & T. Co., 17 P. R. Rep., 69.

The latter case was a suit for tort for personal injuries and one question discussed was the kind of *damage* for which recovery could be had under the Porto Rican statute, which was a section re-enacted from the Spanish Code, and in that connection the court said:

> "The Spanish word 'daño' was translated by the English word 'damage,' and its signification should be fixed by construing the same in harmony with the fundamental change brought about in our institutions, the more so as said signification is not contrary to that established by the former jurisprudence, but is more ample and liberal, more just and equitable."

Bearing in mind this salutary canon of construction indorsed by the highest court of the island, we proceed to present the local law. Book four of the Civil Code of Porto Rico treats of "Obligations and Contracts" and title VIII of that book is headed "Partnerships." From the very first section (1567) of that title, which section defines a partnership, the similarity of its provisions to the general American law is noticeable, but the portion with which we are directly concerned is the third and last chapter, which is entitled "Manners of Dissolving Partnership." Its first section is

> "SECTION 1602. Partnership is dissolved:
> "1. When the term for which it was constitued expires.
> "2. When the thing is lost, or the business for which it was constituted ends.
> "3. By the natural death, civil interdiction, or insolvency of any of the partners, and in the case prescribed in section 1601.
> "4. By the will of any of the partners, subject to the provisions of sections 1607 and 1609." * * *

Section 1601 refers to the attachment of partnership assets by a creditor of an individual partner, which has no bearing upon our discussion; hence the two sections specified in the last subdivision are the only ones which may be material. They read as follows:

> "SECTION 1607. The dissolution of the partnership by the will or withdrawal of one of the partners shall only take place when a term for its duration has not been fixed, or if this term does not appear from the nature of the business. In order that the withdrawal may be of effect, it must be made in good faith at the proper time; notice thereof shall also be given to the other partners.
>
> * * * * * * *
>
> "SECTION 1609. No partner can demand the dissolution of a partnership which, either by a provision of the articles or by the nature of the business, has been constituted for a specified time unless there should exist sufficient reason, such as when one of the partners fails to comply with his obligations, or when he becomes incapacitated for the partnership business, or any other similar cause, in the judgment of the courts."

Section 1607 seems intended to apply especially to cases of withdrawal of a partner, that is, where one desires to escape further responsibility by turning the business over to the others, and was admitted in argument in the court below by counsel for complainant to be inapplicable. This reduces the discussion to section 1609 alone, and the allegations of paragraph XV (p. 15) indicate that she acted in declaring the dissolution as she did, so far as any special provision of Porto Rican law was in mind, under the authority of that section, stating therein in what respects complainant had "failed to comply with his obligations." It therefore seems safe to assert that, unless the proper construction of section 1609 deprives a member of a partnership "for a specified time" of the power to dissolve before that time has expired without a

preliminary appeal to the courts, the bill of complaint was without foundation in the law of Porto Rico.

Such a construction of that section as contended for by complainant would deprive a partner of the power to declare a dissolution *under any circumstances.* He must in all cases first appeal to the court and await its determination as to the sufficiency of his reasons. Hence a partner might be openly embezzling the funds of his firm, or he might be perpetrating acts of arson upon its property or upon the property committed to its care by others, for the loss of which all the partners would be equally responsible; yet his rights as a member of the firm could not be terminated until an appeal to the courts could be made effective. Or, to put a case even more extreme, although the partner at fault were not to deny the right to a dissolution but balked at acknowledging it by an express agreement, yet the innocent partner would be remediless without invoking "the judgment of the court." A construction which leads to such results seems unreasonable and unnecessary.

On the other hand, under a reasonable construction recognizing the power of dissolution in the first instance in the partner, in consonance with the American law already cited, the damage and even ruin otherwise within the power of a defaulting partner to inflict can be prevented, or at least minimized while there remains to the excluded partner the right of appeal to the courts for his ultimate protection. The court is admittedly the final arbiter, but the construction adopted should not be such, unless its wording makes it imperative, as to compel an injured partner to resort to it in all cases because powerless himself to take action, to which in many instances the wrong-doer would submit without protest.

We submit that this statute should be given its simplest and most rational meaning, which is at the same time that most in harmony with American decisions, and which may be more clearly expressed in English by the converse of the ordinary mode of expression in Spanish (of which the word-

ing given in the Code is the most literal translation possible), that is, that a partner *may* dissolve a partnership constituted for a specified time *whenever* there may exist sufficient reason of the character specified, the courts to be the final arbiters of the sufficiency of the reason upon which the dissolving partner acted. Such an interpretation brings this statute squarely within the reasoning of *Karrick vs. Hannaman* and, to apply the expression of the Supreme Court of Porto Rico, "is not contrary to that established" by any other court, as our research has, we believe, enabled us to state that the meaning of the statute upon the question now involved has never been decided by the Supreme Court of either Spain or Porto Rico.

We therefore contend that under that statute defendant had a right to declare the partnership dissolved for what she considered "sufficient reason," being responsible for the consequences of her act if the proper court upon being appealed to should decide that her reasons were in law insufficient and her action unwarranted.

(2) *Sufficiency of Defendant's Reasons.*

No reference to this subject is made in the decree which declared the dissolution of the partnership (p. 45), but in the opinion of the court upon which the decree was based (p. 43) it was stated:

> "I am of opinion that, under all the evidence and under the existing law, not only the law of Porto Rico in relation to partnerships, but also the general jurisprudence of the United States, the respondent Zimmerman was without legal warrant in taking into her sole possession the property and assets of the partnership upon August 8, 1911, and in excluding the complainant from a joint share in the management and profits thereof, and that her action taken upon said last mentioned date did not, in law, dissolve said partnership," etc.

This is the only reference in the opinion or decree to what the court considered the legal effect of the evidence upon the defense of "sufficient reason," and the language does not make it clear whether the conclusion that defendant "was without legal warrant" is founded upon the erroneous construction of section 1609 contended for by complainant, or upon lack of *proof* of the sufficient reason which, under the correct construction of the statute, would constitute legal warrant.

It cannot be doubted that, if his postulate was upon "the general jurisprudence of the United States," his conclusion was erroneous; and we think it also clear that it was equally erroneous if postulated upon the construction of section 1609. We now assert that it was erroneous if based upon a lack of proof, and will proceed to demonstrate it.

Among defendant's specifications as to complainant's "failure to comply with his obligations" (p. 15) were (*a*) by violating the partnership agreement as to not impairing the capital, and (*c*) by his mismanagement of the café business, or failure to account for its receipts, which resulted in the loss of money in its operation. The admissions of the bill and the proof contained in the auditor's report substantiate the first; the provision in the decree substantiates the second, as the following explanation will make clear:

(*a*) Impairing the capital.

According to paragraph V of the bill (p. 4) the partners agreed to contribute $2,000 each as capital, of which complainant had only $500 of his own, the balance being secured from the bank on the joint note of the partners "to be paid out of earnings." According to the auditor's balance sheet of August 8, 1911 (pp. 21-2), the firm out of its "total assets" had the following items which can be regarded as available working capital: Cash, $1,591.39; inventories, $1,300; advance payments, $469.15, and accounts receivable, $972.64, or a total of $4,333.18, against which must be charged bills and accounts payable of $1,768.53, making

their net working capital only $2,564.65; while Exhibit A, schedule (4) of the same report (p. 25) shows that complainant had, previous to that date, on a cash investment of $500 withdrawn from the working capital $1,959.56 as against withdrawals by the defendant of only $596.85 (p. 27).

(c) Failure to account for café receipts.

Exhibit A, schedule (1), of the auditor's report (p. 23) shows that the bar receipts (otherwise designated as café receipts) from February 1 to August 8 were $2,876.36, while expenses of the bar amounted to $3,024.74 (supplies $2,733.83 and wages $290.91), which sustained defendant's charge that the café had been run at a loss. In its opinion the court said on this subject (p. 43):

> "Testimony was introduced on behalf of the respondent tending to show gross carelessness in the manner in which the plaintiff handled the cash receipts at the bar, and, from oral and other evidence, including the testimony of the parties hereto, and of the barkeeper, and from the report of the accountant filed herein, it would seem that the sum of $618.00, as an approximate amount would remain to be accounted for by the complainant from such receipts, and that he should be surcharged therewith."

And by the court's decree, following that opinion, it was ordered that complainant be "surcharged the sum of $618 on account of the bar receipts" (p. 46).

Yet, notwithstanding this uncontradicted evidence and its own conclusion that such a considerable shortage existed, the court concluded, either that such violations of partnership obligation were not of a character to constitute "sufficient reason" for dissolution, or that under the statute above discussed no reason could be sufficient for a voluntary dissolution without the previous "judgment of the court." While no pronouncement of the court enables us to say upon which

theory it acted, due respect for its action inclines us to believe that it must have been upon an erroneous view of the law rather than of the facts.

Whichever it may have been, we submit that the conclusion of the court was erroneous, and that upon the merits under the pleadings and proofs the decree should have been for the defendant.

III.

Cross-Errors Not Supported by the Record.

From the record it appears that upon the cross-appeal of the complainant four errors have been assigned, which will be considered in a word.

Cross-Errors I and II. These are evidently based upon the third prayer of the bill of complaint (p. 9), asking that defendant's interest in the business be forfeited because of her alleged wrongful attempt to dissolve the partnership.

Certainly there is no warrant for such a prayer in the American law, and its only assumed basis in the law of Porto Rico is the last clause of section 607, hereinbefore quoted. But that clause does not warrant such an asking in this case for two reasons. First, because that clause refers to the *withdrawal* of a partner in bad faith, and there is no question of withdrawal here; on the contrary, the complaint is that the defendant *absorbed*, not withdrew. And, second, the premise which alone makes the provision applicable in any case is *bad faith*, and there is no finding of the court here that defendant acted in bad faith.

Cross-Errors III and IV. These both refer to alleged mistakes of the court below in making certain charges or allowances in the accounting between the parties under the theory of a still-subsisting partnership. The conclusion of the court upon these matters must necessarily have depended upon its

appreciation of the evidence as a whole, and, as complainant has not required the evidence at large to be embodied in the record, this court has not before it the data for reviewing those conclusions.

In conclusion, it is respectfully urged that the decree of the court below should be reversed, with directions to enter a decree for defendant upon one of the grounds presented by our assignment of errors.

N. B. K. PETTINGILL,
Counsel for Appellant Amy B. Zimmerman.

I hereby acknowledge receipt of a copy of the foregoing brief for appellant Amy B. Zimmerman.

San Juan, Porto Rico, December 24, 1912.

H. H. SCOVILLE,
Of Counsel for Cross-Appellant Frank F. Harding.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 771.

AMY B. ZIMMERMAN, APPELLANT,

vs.

FRANK F. HARDING, APPELLEE,

AND

No. 894.

FRANK F. HARDING, CROSS-APPELLANT,

vs.

AMY B. ZIMMERMAN, CROSS-APPELLEE.

BRIEF FOR CROSS-APPELLANT FRANK F. HARDING.

Statement.

For convenience we will adopt the designation of the parties in this court as the same have been presented by counsel for appellant Zimmerman, namely, we will refer to the cross-appellant as complainant, meaning the com-

plainant in the lower court, and to the appellant as defendant, meaning the defendant in the lower court.

On the 1st day of February, 1911, complainant and defendant entered into a partnership to conduct a hotel business at Miramar, a suburb of San Juan, Porto Rico (Record, pp. 3, 4).

The terms and conditions of the partnership were not set forth in writing, but they were so simple that no complication could arise from the failure to reduce their agreement to a written document. The facts leading up to the partnership were that complainant Harding had negotiated with the owners of said hotel for a lease thereof, said Harding and said owners having agreed upon all the terms and conditions relative thereto. The owners required of Harding that a deposit of $3,000.00 should be made by the lessee of said property besides the first month's rent amounting to the sum of $600.00. In addition thereto it was also conceded to be necessary that some small investment be made in the way of furniture or other material necessary to the proper conduct of the business, in all requiring a sum amounting to about $4,000.00.

As before stated, the lessors required of Harding either a guarantor satisfactory to them for the payment of said rent, or a copartner of sufficient financial strength to produce the same result. Thereupon the complainant conferred with the defendant Zimmerman, and, they having arrived at a satisfactory agreement as between themselves, the complainant submitted her name to the lessors of the property for their acceptance as the associate of complainant as lessee. Harding's tender of Mrs. Zimmerman as a copartner was finally accepted by the owners of the property, and on the 1st day of February, 1911, Harding & Zimmerman, having deposited the money required and executed the lease as the same appears in the record on page 47, entered into possession and operation of the property.

Harding became the active manager of the hotel business

as the same related to the office, dining-room and café; while his partner was supposed to have charge of the kitchen, bedrooms, and other household responsibilities that naturally go with the housekeeping part of the business.

The affairs of the firm ran smoothly, and about the first of the following month of May defendant Zimmerman departed for her summer vacation in the States. She was absent until about the first of July, and on or about the 8th of said month complainant Harding left for the United States on his vacation, leaving the defendant in charge of the business. About a month later, or on the 8th of August, 1911, when complainant was in the States, he received, or rather his brother, H. H. Harding, received, a letter from Mrs. Zimmerman stating that she had dissolved the partnership, taken charge of the business, and placed a notice in the local papers to that effect (Record, pp. 5, 6).

Early in September the complainant returned to Porto Rico and found the conditions above stated. On the 16th of the same month he commenced an action in the District Court of Porto Rico for the District of San Juan against the defendant, in which he asked for damages to the extent of $16,737.75 (Record, p. 3). By said complaint he alleged the same contract that appears in the bill in the case at bar, and avers that the action of the defendant in attempting to oust him from the business was without any excuse or legal reason whatsoever.

On September 29th of the same year the defendant transferred said cause to the United States District Court for the District of Porto Rico (Record, p. 51). The brief of counsel for defendant Zimmerman rests principally upon the fact that this action was brought in the District Court of San Juan as an action at law and that the complainant Harding, having elected his remedy, could not thereafter abandon it and transfer his cause to the equity side of the court.

The complainant had a perfect right to bring his action in the District Court of San Juan, but in so doing he had no

choice of remedies as between law and equity. No action akin to a suit in equity is known to the courts of law in Porto Rico. He therefore made no election, and had no election.

In presenting this brief it is extremely unfortunate that the record is not before the court, but it is perhaps not improper that one or two facts in connection with the filing of this action may be presented, although outside the record, as controlling the course of the plaintiff Harding in bringing the action at law in the district court for San Juan. In that proceeding, Judge Hord was his active counsel and adviser. Judge Hord had been a judge on the bench in this same district, and was equally fluent in writing and speaking English or Spanish. It was not believed by Mr. Harding nor by his counsel that the action of Mrs. Zimmerman in seizing upon the assets of the partnership and assuming control of the business released Mr. Harding from any liability he had assumed. The district court so held (Record, p. 43). Furthermore, it was apparent that further partnership relations were impossible. It became important, then, to dispose of the matter in the quickest time possible. They believed that it would require three years (and, under the ordinary procedure, we do not know of a case that has ever passed through the United States District Court for Porto Rico and the Supreme Court of the United States in less time) to litigate the rights of the parties hereto through the United States District Court for Porto Rico and an appeal to this honorable court; whereas, the entire litigation would probably be closed within a year in the local courts. Hence, in view of the existing liability, and Judge Hord being equally familiar with the language and the practice in both courts, selected the forum in which he thought he could, in the shortest possible time, find for his client the relief which he believed, and the present counsel for complainant believe, the laws of Porto Rico afforded. But it was the right of the defendant Zimmerman to have her case transferred to the United States District Court, and

she so transferred it. It is also a fact that the Porto Rican judges follow strictly all the statutory provisions, and, as will subsequently appear herein, section 1608 of the Civil Code of Porto Rico was not a wholesome provision for defendant.

For the first time, then, in the history of the cause, the complainant found himself in a court where there may have been an election of remedies. Having been brought into the United States court, he sought the equity side of that court, where matters involving partnership affairs, and especially accountings, are, in the United States almost universally litigated and where his action properly belonged.

> "The equitable jurisdiction is also practically exclusive in proceedings for an account and settlement of the firm affairs between the copartners themselves; * * * The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief."
>
> Pomeroy's Equity Jurisprudence, vol. 4, p. 2801, sec. 1421.

The court, on motion of counsel for complainant, dismissed without prejudice the action at law which had been brought in the District Court of San Juan, and from every viewpoint this was the better course to pursue. As far as the experience of counsel for complainant goes in the practice of said court, both from actual practice and from observation, it has been the rule in said United States court, when a cause belonging to the equity side of the court has been transferred to the United States court, to order the pleadings rewritten, that they might conform to the practice in that court, and this was what the proceedings in this case amounted to. It is impossible to logically contend that the defendant might transfer her cause into the Federal

court and then deny to complainant any form of remedy which the law and the practice of that court afforded.

Thereupon, as stated in the brief of counsel for defendant, the action was dismissed on motion of solicitors for complainant, and a bill of equity filed, asking an accounting and a dissolution of the partnership upon the grounds in said bill stated. But while complainant changed his form of action to suit the forum in which the cause was to be tried, *he did not seek or expect to change the law of Porto Rico affecting the rights of partners or governing their relations* one with another.

The court, the judge thereof at the time suffering severely from an accident, gave a hurried hearing to the bill and answer just before his departure for the North. Notwithstanding the statutory law governing the rights of these parties which is presented in this brief; notwithstanding the fact that upon reflection the court did not hesitate to hold that the attempt to dissolve the partnership by the defendant Zimmerman was unlawful and ineffectual; yet, at the hearing referred to, a receiver was denied almost as quickly as the bill could be read, and the result of that hearing was that the court appointed an auditor to examine the accounts and report his findings and conclusions to the court upon his return from the North (Record, p. 17).

With this report we find no fault; the persons designated were competent and conscientious, but were unable to find in said books or in all of the accounts of said firm the $618 with which the honorable judge of said court surcharged the account of complainant Harding, nor is such an item nor such a figure to be found in the report made by the auditor from the beginning to the end thereof.

The court's final decree (Record, pp. 45 and 46) held that the partnership had not been dissolved by the defendant and then appointed a special master to take charge of said property and to conduct the business in connection therewith for thirty days and then to sell the same, directing the

division of the proceeds thereof between the partners as their interests might appear.

The fact is that the order entered December 6, 1911, appointing an auditor to state the accounts of the firm, and the decree of May 18, 1912, gave the defendant entire charge and control of this property during the tourist months of the year, when its operation is very profitable, and during which time a receiver should have been in charge; and yet, as will in this brief appear, the court gave to defendant, under her unlawful seizure, half of the profits and $200.00 per month for conducting the business unlawfully acquired (Record, pp. 30 and 34).

ARGUMENT.

In presenting our views of the legal rights of the parties we will follow the brief of counsel for the defendant Zimmerman.

The assignments of error are found in the record at page 64, but in his brief counsel relies upon two of the specifications only.

> "*First*, that the bringing of the previous suit at law, as set forth in paragraph XVI of defendant's answer and proven by the unchallenged record of that suit, was an election of remedies on the part of complainant which constituted a good defense to the subsequent bill in equity to which it was pleaded, whatever may have been the intrinsic merits of that bill."

The truth seems to be that this assignment is about the only basis upon which counsel hopes to obtain a reversal, and to us it seems to be wholly untenable. On page 16 of the record appeared the separate defense of the defendant, in which she sets up the action brought in the insular court as a bar to a later proceeding in equity under the circumstances already set forth. It is therefore clear that in the pleadings the fact that this action at law was brought in

the insular court is made to appear, yet all through the argument and the discussion of the question counsel appears to have lost sight of the fact that the action at law in the Federal court was there by virtue of *his* act, and *not* by virtue of an election by the complainant. Unless one is cautious in reading the brief of counsel, he will lose sight of this point.

The actual fact is that what the complainant had elected was a forum, and not a remedy. The forum selected was the district court of San Juan, an insular court. In that court there was no choice of remedy. While in that court awaiting the answer of the defendant the complainant was by said defendant transferred to an entirely different forum, and where a new and distinct remedy obtains. The contention of counsel for defendant really is that the party defendant may cause an action to be transferred from the forum selected by the complainant into a different forum, where different remedies are at the disposal of the plaintiff, and still require the plaintiff to follow the remedy he was obliged to adopt in the forum he had first selected. It is thus clear that what counsel is seeking to hold the plaintiff responsible for is that he selected the wrong forum and not the wrong remedy.

Whether the law requires it or not, the practice is to take all dissolutions of partnerships, and especially if accompanied by an accounting, into a court of equity. The complainant, finding himself in that court, exercised what we contend to have been a right—that of availing himself of whatever remedy he might avail himself of upon his entrance into the forum. It is true that he was brought to this forum by the defendant, but it is equally true that he found himself in the United States court; he had not by his own act, or at all, elected what remedy he would pursue in the forum to which he had been taken. He then for the first time exercised the right which he had undertaken or been permitted to exercise in any court, that of an election of his remedy.

Nor do we agree with counsel that the proviso added by the

court that an action dismissed without prejudice carries with it only the right to bring a new action under the same remedy. Our view upon that point is that the exact opposite obtains. For instance, if a party brings an action on the equity side of the court, and the court finds that the suit is not one of equitable jurisdiction, or that the party bringing the suit has a proper remedy at law, the action will be dismissed without prejudice, and to the very purpose that the party thus dismissed may bring his action on the other side of the court. So thoroughly has this principle been established that several decisions of the Supreme Court are to the effect that if a party to a suit in equity finds himself on the wrong side of the court, and is dismissed therefrom because of lack of equitable jurisdiction, even if the court should fail to add that the suit is dismissed without prejudice, nevertheless the dismissal is not a bar to an action at law. It is the purpose and the intention of the court always to try a case upon its merits and within whatever forum it belongs; and so, unless the merits of a controversy have been passed upon, a dismissal by a United States court is not a bar to the action.

The foregoing statement in our opinion covers the proposition of the right of the complainant after he had been, by action of the defendant, transferred from one forum to another to elect whatever remedy the new forum presented. (But it is doubtful in the case at bar if it was not the duty of the plaintiff to ask, under the practice, that his action at law be dismissed and that he be permitted to place himself on the equity side of the court, where suits in partnerships and accountings of that nature properly belong.)

In his brief, at page 8, counsel refers to the entire record in the action commenced in the insular court, and found at pages 49, 50, and 51 of the record, as if the rights of the parties had really, in some form, been tested in a territorial court, when, as a matter of fact, on page 51, following the plaintiff's complaint, the only record made in that court was the filing of the complaint and an order of transfer. Nor

did defendant file any answer in any court, nor was there ever an opportunity for any court to try said cause upon its merits, until the defendant filed her answer to complainant's bill in equity in the United States court, the forum in which it properly belonged, after the transfer.

Counsel first states in favor of his general proposition that an election of remedies had been made by complainant when he brought an action in the insular court, and cites Pierce *vs.* T. C. I. R. Co., 173 U. S., 1-16.

We have examined this case with as much care as the brief time permitted since the receipt of defendant's brief. We fail to see that said decision has any application whatever to the case at bar. Pierce *vs.* T. C. I. R. Co. was an action for damages under the following circumstances: Pierce was an employee of the company, and in the course of his labor met with an accident by which he was seriously injured. After much negotiation the company offered to furnish him house rent and supplies to the value of $65.00 a month for whatever period of time he might be disabled. This contract was oral. Later they made a written contract, under which the terms of the agreement were modified, and continued under the new agreement until Pierce brought an action against the company for a breach thereof. We do not know any more of this decision than that it holds that, the contract having been breached by one party, the injured party might bring an action once for all to recover all of the damages to which he would be entitled under the agreement, provided he proved any damages at all.

It could have no application to this case except that the complainant had a perfect right to sue in the insular court and in one action determine all of the damages that he had suffered by reason of the defendant's breach of contract. We see no reason for disputing the proposition, and had it not been for the action of the defendant in removing the case to the Federal court, no doubt it would have been so tried and determined. But the entire statute would have been enforced.

The case of Schell *vs.* Plumb, 55 N. Y., 592, is not before us, but from the extract quoted in defendant's brief it appears to be in line with the doctrine above stated. It has no application to the dissolution of a partnership in Porto Rico.

We have also examined the case of Robb *vs.* Vos, 155 U. S., 13, which we are unable to apply to the facts involved in the case at bar. The action brought in the case at bar in the insular court was entirely proper in form and substance. and after the manner of such a proceeding the plaintiff in said court asked damages. It was his only remedy. The proceeding in equity for an accounting and a dissolution are not known to that court, therefore we insist he made no election beyond his forum, and as we have already stated that forum was selected because of the belief on the part of complainant and his counsel that the partnership had not been dissolved; that he would be chargeable with any liability that might accrue against the firm, and hence asked that her action be deemed a rescission of the partnership contract and for damages, instead of an accounting and his share of the profits.

The facts. the nature of the action, and the questions of law are so entirely, so absolutely different in Bierce *vs.* Hutchins, 205 U. S., 343, from those presented in the case now under consideration that we are unable to make any application of the views of the court in that case to the issues involved in the one at bar.

Karrick *vs.* Hannaman, 168 U. S., 328, holds, and nothing more. that in case of the breach of a partnership contract by one of the partners the injured party may bring an action at law for the recovery of damages. In the event of an accounting to be had and a dissolution, nothing is said. and, furthermore, it excludes the statutory law of Porto Rico on the subject, which provides that a partner cannot dissolve the partnership at will, provided its term has been fixed by the partnership agreement or may be determined from

the nature of the contract. The Supreme Court does not say, in any of the cases cited, that such a statute is not valid and binding, nor is there the slightest reason to suppose that this court would interfere with the statutory rights of partners in Porto Rico based upon that statute.

And the court is very conservative in the case last referred to, even as to the right of a partner to dissolve at all where the term of the partnership is definitely fixed. Mr. Justice Gray said:

> "We are not prepared, therefore, to assent to the opinion of the court below, that a partnership for a definite time cannot be dissolved by one of the partners at his own will, and without the consent of his copartners within that time; and, consequently, that the partnership between these parties was not dissolved on February 1, 1888, when the defendant assumed exclusive control of the business and property of the partnership and excluded the plaintiff from any participation therein. But it is unnecessary to express an opinion on this point, because, however it may be decided, it would not affect the conclusion in favor of the plaintiff in the present case."

(Why did not counsel insert this paragraph from said decision in full?)

Thus we see that in this case so much relied upon by counsel for defendant the court not only did not decide in favor of his contention, but distinctly stated that it *did not pass upon* the point involved. All of this is entirely independent of the fact that we are here under a statute that clearly defines the rights and obligations of the parties.

From these various decisions counsel draws several deductions, but only the first one is of sufficient interest, in our opinion, to justify its reproduction in our brief. It is as follows:

> "(1) That one member of a partnership for a fixed period *can* at his own will dissolve that partnership and 'assume exclusive possession and control of

> the business.' What responsibility such partner may thereby incur, if his action be wrongful, is another question subsequently treated; but the partnership *as a partnership owning assets in common* by such volition of the one partner *ceases to exist.*"

This conclusion is exactly contrary to section 1607 of the Civil Code of Porto Rico, which states that a partner *cannot* withdraw from a partnership contract the term of which is fixed.

This also utterly disregards section 1607, *supra*, which says that if the withdrawing partner appropriates the business and its proceeds to his own use, then his attempted dissolution is by that statute *declared to have been in bad faith.*

What, then, are these quotations, arguments, and conclusions worth in the face of this direct and positive statute?

The Case on Its Merits.

Counsel for defendant, Zimmerman, discusses the case at considerable length on its merits. No findings of fact have been presented upon which this court could readily be advised as to any of the facts produced by the evidence in the court below. We do not believe the court will consider this assignment, but at any rate prefer to brief the same.

Counsel is in error in stating in his brief that it was conceded that section 1607 is inapplicable in this case. The fact is that our serious contention was that sections 1607 and 1608 were the two sections that covered this case. The withdrawing partner undertaking to withdraw under section 1607 must not be bound by the term of the contract, either expressed or implied. It being conceded in this case, which it must be, that the partnership was for a term of at least two years, the defendant could not withdraw or dissolve the partnership except by order of court under section 1609.

Section 1607 means, in effect, that if a partnership possesses assets of value, or that no injury results from the withdrawal of the partner, *and that the withdrawing partner*

is not bound to act for any specified term, the act of withdrawal may be at will. But this is followed by the last paragraph of section 1607 and section 1608 of the Civil Code, that the *withdrawal must be in good faith*, and that if the withdrawing partner shall *seize upon the assets or business of the partnership and seek to appropriate said assets and the benefits of the business to his own use*, then section 1608 declares said withdrawal to have been in bad faith, and it would be so plain upon its face that such an act would be in bad faith that the statute is entirely reasonable.

The court held that the defendant was without legal warrant in attempting to dissolve the partnership. The fact is that she never alleged or proved anything of serious import. In the absence of the complainant on his vacation, and within eight days after his departure, she placed the business practically in the hands of one Dr. Tobynne, as alleged in the bill (Record, p. 10, f. 19). If $618.00 were short from the bar, she did not know it; nor did she allege it, nor did the accountant find it, nor did anybody swear to it.

The facts were as stated by the court in its opinion that her testimony, and her whole action in the case from beginning to end was so childish from a legal standpoint as scarcely to command serious consideration by a court of justice; yet much was involved, the continuance of the partnership was impossible, and a decree must necessarily be entered.

We are unable to see upon what ground counsel could for a moment contend that any serious error was committed by the court in decreeing the dissolution and ordering the accounting.

The Porto Rican Statute.

We have been told by this honorable court a sufficient number of times that in presenting here the rights of litigants under the laws of Porto Rico we must expect that those rights will be determined by Porto Rican law, that it

would seem to be an intrusion upon the patience of the court to attempt to discuss the rights of parties resting upon Porto Rican law under other laws or principles, especially when they are sufficient to cover the issues involved.

It is conceded that a partnership was formed between complainant and defendant.

Subdivision 4 of section 1602, Civil Code of Porto Rico, in defining how a partnership may be dissolved, says:

> "4. By the will of one of the partners, subject to the provisions of sections 1607 and 1609."

And we comment: Under 1607, by the act of the partner, and under 1609, by the action of the court.

> "SECTION 1607. The dissolution of the partnership by the will or withdrawal of one of the partners shall only take place when a term for its duration has not been fixed, or if this term does not appear from the nature of the business.
>
> "In order that the withdrawal may be of effect, it must be made in good faith at the proper time; notice thereof shall also be given to the other partners."

The entire record tends to show that defendant intended to withdraw from the firm "just because"; always a good woman's unanswerable reason.

The first essential condition that must exist to enable a partner to withdraw at will is that a term for the duration of the partnership has not been fixed, or that the term does not appear from the nature of the business.

In the case at bar the term of the partnership is not set forth in articles of partnership; but that term clearly appears from the nature of the business. The lease (Record, p. 47) obliges the partners to pay the rent for at least two years, and transfers to them a going concern to be operated for that period, with the privilege of an extension of two years more upon the additional payment of $200 more per

month; so that there was no condition under this statute under which either partner could withdraw at will.

Section 1609 affords another condition under which a partnership may be *dissolved*, but no provision for the withdrawal of a partner. It requires that in such case it be dissolved upon "the judgment of the court." The section in its entirety is as follows:

> "SECTION 1609. No partner can demand the dissolution of a partnership which either, by a provision of the articles or by the nature of the business, has been constituted for a specific time unless there should exist sufficient reason, such as when one of the partners fails to comply with his obligations, or when he becomes incapacitated for the partnership business, or any other similar cause, in the judgment of the courts."

The evident intention of this section of the statute is that one partner shall not be permitted to be the sole judge of the rights and interests of his copartners. "If," the statute says, "there should exist sufficient reason," then the party conceiving himself to be injured may demand the dissolution at the hands of the court.

In the case at bar the court found that no such reason existed. Nevertheless, without said right as found by the court, and with a showing as an excuse therefor that could not command serious consideration, the defendant seized the $1,591.39 belonging to the firm (Record, p. 35), besides all of the other firm assets, including the accounts and business.

THE CROSS-APPEAL OF FRANK F. HARDING.

Assignment of Errors.

"I and II.

"The court erred in holding that the defendant Amy B. Zimmerman was entitled to participate in the profits of the partnership of Harding & Zimmerman after the 8th day of August, 1911.

"III.

"The court erred in allowing and awarding to the defendant Amy B. Zimmerman salary from the 8th day of August, 1911, to the date of the dissolution of said partnership under the decree of the court.

"IV.

"The court erred in holding that the complainant should be charged with any amount whatever on account of bar receipts as set out in said decree."

Argument on Assignment Number I.

Assuming that we are following the statute of Porto Rico, as this honorable court has so often directed us to do, especially when they are clear as to their intent and meaning, we urge that the court erred as stated in this paragraph. Both sides have practically agreed that the dissolution at will mentioned in section 1607 of the Civil Code was without warrant. The last paragraph of section 1607 is as follows:

> "In order that the withdrawal may be of effect it must be made in good faith at the proper time; notice thereof shall also be given to the other partners."

What is meant by "withdrawing at the proper time" is not exactly clear to us and is, perhaps, of no importance in this

case; but the fact that defendant served the notice required under this subdivision of section 1607 would indicate that she intended to rest her rights under that section. Her appeal to section 1609 is an afterthought, but under the showing affords no relief. The withdrawal of a partner requires that it shall be made in good faith. We invite the attention of the court to section 1608 of the Civil Code of Porto Rico, which is as follows:

> "SECTION 1608. A withdrawal is in bad faith when the person who makes it proposes to appropriate to himself alone the benefits which should be common. In such case the person who renounces it does not free himself from liability to his partners, and they shall have the power to exclude him from the partnership.
>
> "A withdrawal shall be presumed as not made at the proper time when, the things not being integral, the partnership is interested in delaying its dissolution. In such case the partnership shall continue until the conclusion of the pending transactions."

In view of this section we are unable to understand how the court must have declared, as it did, that defendant did not dissolve the partnership, was without justification under the law either of Porto Rico or the United States in attempting to do so, and yet does not hold her responsible for the violation of the statute as set forth in section 1608. The first subdivision of that section will bear repetition in view of the point we wish to emphasize.

> "A withdrawal is in bad faith when the person who makes it proposes to appropriate to himself alone the benefits which should be common. In such case the person who renounces it does not free himself from liability to his partners, and they shall have the power to exclude him from the partnership."

We quote from the opinion of the court as follows:

> "I am of opinion that, under all the evidence and under the existing law, not only the law of Porto

> Rico in relation to partnerships, but also the general jurisprudence of the United States, the respondent Zimmerman was without legal warrant in taking into her sole possession the property and assets of the partnership upon August 8, 1911, and in excluding the complainant from a joint share in the management and profits thereof, and that her action taken upon said last-mentioned date, did not, in law, dissolve said partnership."

This declaration on the part of the court is nearly as strong as the statute itself. The statute declares without equivocation or doubt that "the withdrawal is in bad faith when the person who makes it proposes to appropriate to himself alone the benefits which should be common."

Now the court holds that she did withdraw; that she did appropriate the partnership property and proceeds as well as the returns from the business to herself; but instead of carrying this section of the statute into effect by holding that it was in bad faith, and that she should not profit thereby, rewards her by allowing her $1,875 salary for doing an illegal act—an act declared to be illegal both by the statute and by the court. This was a premium for a violation of the law.

We believe that further comment upon the alleged error of the court and the force and meaning of the statute to be without necessity. If, first, we are to follow the statutes of Porto Rico; and, second, that statute is perfectly clear; and, third, the court has followed two sections of that law and omitted to follow the third, which is equally clear and equally forceful with the other two, then we submit that the court erred in not carrying into effect section 1608, which excluded the defendant from any of the benefits of said partnership from the date of her seizure until the final decree.

Assignment Number III.

However, the court may hold that the defendant would be entitled to one-half of the profits arising from the business from the 8th of August, the date of her seizure of the money and property of the firm, until the decree took effect; but even so we do not see upon what basis, either under the decree or under the law, both of which declare her action to have been unlawful and without authority, the salary of $200.00 per month for the management of said business from the 8th of August until the 31st of December, and from the 1st of January until the 18th of May, covering the period of the litigation of this case in the district court, was allowed. We therefore believe that the assignment of error numbered 3 should be approved and that the court below should be instructed to deduct from the amount that may be found due to Mrs. Zimmerman upon the final division of the assets of the partnership the amount allowed her for salary; or, in other words, to return her salary to the common fund. Upon general principles the law does not allow a partner compensation under such circumstances. The statute is silent, and we cite Denver *vs.* Roane, 99 U. S., 358, as follows:

> "A partner must serve without any reward or compensation, unless there is an express stipulation for compensation."
>
> Beatty *vs.* Wray, 57 Am. Dec., 677.
>
> Parsons on Contracts, 9th ed., vol. 1, p. 187.

This seems to be a very brief discussion of a question that is evidently of some financial importance; but we are utterly unable to find any basis in logic or law upon which to continue an argument to the effect that a person is not entitled to a reward for having committed an unlawful act, and so we merely invoke the statute referred to in support of said assignment numbered three.

Assignment Number IV.

We also believe the assignment numbered 4 of complainant Harding to be well founded. In the opinion of the court (Record, p. 43) the court uses the following language with reference to the $618.00 with which he ordered the account of Harding to be charged, and because of which we have submitted the fourth assignment of error.

> "Testimony was introduced on behalf of the respondent tending to show gross carelessness in the manner in which the plaintiff handled the cash receipts at the bar, and, from oral and other evidence, including the testimony of the parties hereto, and of the barkeeper, and from the report of the accountant filed herein, it would seem that the sum of $618.00, as an approximate amount, would remain to be accounted for by the complainant from such receipts, and that he should be surcharged therewith."

On the 6th of December, 1911, the court appointed W. T. Woodbridge, a licensed accountant, to state the accounts of the partnership. In the above excerpt from the opinion of the court, in which the latter charges the complainant with $618.00 as an approximate amount, etc., and cites as a basis for such charge from oral and other evidence, "including the testimony of the parties hereto, and of the barkeeper, and from the report of the accountant filed herein, it would seem that the sum of $618.00 as an approximate amount would remain to be accounted for by the complainant as such" (meaning the bar receipts).

We are unable to find any statement in the different reports made by the accountant, whose integrity and competency nobody challenges, upon which to base the said charge of $618.00, or any other charge of any other amount on account of the failure of complainant to faithfully account for the receipts of the bar. Whether or not the system of bookkeeping was good or bad; whether or not mistakes were made back and forth, as perhaps they were, we are unable to recall the statement of any witness to the effect that one

cent had been unaccounted for from the bar. It is true that the barkeeper testified, as stated in the above excerpt, but it is equally true that he did not utter a word as to any shortage in that account, and he finally departed from the witness-stand, having been called by the defendant, and with the statement that he would be recalled later—a promise which was never fulfilled. We therefore say that within the record itself, and as a matter of fact, there was no basis upon which a charge against complainant in said sum of $618.00 could be made, and that it was an error to do so.

The fact is, we think, apparent, beginning with the hasty action in which the receivership was denied when first applied for and ending with this charge against complainant Harding for $618.00, that the court was struggling with himself to render a conscientious judgment upon the law and at the same time powerfully influenced by sympathy for the defendant, or for counsel for defendant, which led to the allowance to the defendant of the sum (*supra*) for salary under circumstances already set forth, and $618.00 which no witness in all of the proceedings in this case ever testified that complainant failed to account for. We submit, also, that this latter sum should be restored to the common fund.

We therefore pray that so much of the decree of said court as allows any salary to the defendant for the management of said business after her unlawful seizure thereof be reversed and set aside; that so much of said decree as charges the account of complainant Harding with $618.00 misappropriated from the bar receipts of the business be reversed and set aside, principally because the accountant failed to find or report any such fact or condition, supplemented by the fact that no witness testified in support of such a charge, and that the decree be so modified as to require the lower court to make a division between the said partners upon the basis above prayed.

Respectfully submitted,

WILLIS SWEET,
H. H. SCOVILLE,
Counsel for Appellee Frank F. Harding.

ZIMMERMAN v. HARDING.

HARDING v. ZIMMERMAN.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

Nos. 771, 894. Submitted January 10, 1913.—Decided February 24, 1913.

A partnership formed to run a hotel for which a lease is obtained *held* in the absence of any stipulation as to duration to be for the term of the lease.

Where partnerships are regulated by statute, as in Porto Rico, the rights of one attempting to dissolve depend upon the statute rather than on general law applicable elsewhere.

The right to dissolve under § 1607, Civil Code Porto Rico, is confined to partnerships the duration of which has not been fixed; under § 1609 a partnership for fixed duration can only be dissolved for sufficient cause shown to the court, and one attempting to dissolve before the fixed termination and to exclude the other from participation must account to the latter for his share of the profits until the court decrees a dissolution in a suit brought to dissolve.

Partnership property continues to be such after as well as before dissolution.

Where one party attempts to illegally dissolve a partnership without suit and subsequently the other brings a suit for dissolution in accordance with the statute the former must account for all profits until the final decree of dissolution.

The doctrine of election is applicable as between inconsistent remedies; but does not apply to a partner wrongfully excluded from participation. He does not lose his right to an accounting because he first starts an action at law which he subsequently dismisses.

There may be a recovery at law for damages resulting from a breach of the partnership agreement as well as an action for accounting in equity for the same breach, and a partner wrongfully excluded from management and profits need not wait for the end of the period but may show in an action at law his probable profits.

One who wrongfully excludes the other partner from management of the partnership affairs is not entitled to a salary for managing them during such period of exclusion.

This court can only review an improper allowance of salary to a partner where an exception has been filed to such allowance.

Where the case has been tried in an irregular manner and items are allowed in the final decree which do not appear in the auditor's or master's report, this court cannot attempt to correct errors assigned here and will presume that the decree so far as it stands upon questions of fact is supported by evidence not objected to.

THE case in substance is this:

The appellee, Harding, undertook to obtain a lease from the owner of a hotel property situated in a suburb of San Juan, Porto Rico, and an option of purchase. The parties agreed upon the rental, term of the lease and upon an option of purchase during the term of the lease, but the owners required Harding to associate himself with another person, as co-lessee, satisfactory to them. After some negotiations Harding arranged with the appellant, Mrs. Zimmerman, to join him in the lease and option and to form a partnership to operate the hotel. Each agreed to contribute one-half of an agreed capital, their personal services and to share in the profits and losses, equally. The agreement of partnership was never reduced to writing, and there was no express stipuation as to its duration.

Under date of February 1, 1911, the owners of the hotel property executed a lease to the partnership for the term of two years, with right of renewal for another term of two years at an advanced rental. This lease included an option of purchase during the term at a price named. Thereupon the partnership took possession of the property and its operation as a hotel. Harding undertook the office side of affairs and Mrs. Zimmerman the other departments. The business seems to have run along smoothly and with profit until about August 9, 1911, when Mrs. Zimmerman, who was in sole charge by reason of the temporary absence of Harding upon a vacation in the United States, assumed of her own motion to dissolve the partnership. To this end she notified Harding by letter that she had dissolved the relation and published a card in the local papers that the partnership had been

dissolved, and that she would thenceforth conduct the business for her own benefit. From that moment she assumed the entire ownership and possession of the partnership business and property. Harding was excluded from all possession, control or voice, and all benefits which had accrued, she claiming that he had drawn more than his share upon an accounting.

When Harding returned to San Juan, he at once brought an action at law against Mrs. Zimmerman to recover damages for the breach of the partnership contract. This suit was removed by Mrs. Zimmerman to the District Court of the United States for the District of Porto Rico. Thereupon Harding obtained leave to dismiss his action at law, without prejudice, and filed this bill. Its object was to obtain a decree of dissolution and an accounting of the partnership affairs. The appointment of a receiver to manage the business pending the litigation was at once sought by Harding under the averments of the bill. This was resisted, and denied by the court. Upon the coming in of her answer an auditor was appointed to report upon the partnership accounts. Mrs. Zimmerman remained in full control of the hotel business down to the date of final decree, May 18, 1912, by which the partnership was dissolved. At that date a special master was put in charge of the business to conduct it until a sale of the assets should be had and distribution made. The partnership property, including the unexpired term of the lease, was sold and the auditor and master's report confirmed. The final result was that the share of Harding in the proceeds of the business, including profits realized to date of sale was fixed at $3,008.02, and that of Mrs. Zimmerman at $4,878.22. From this decree both parties have appealed.

Mr. N. B. K. Pettingill for Zimmerman.

Mr. H. H. Scoville and *Mr. Willis Sweet* for Harding.

MR. JUSTICE LURTON, after making the foregoing statement, delivered the opinion of the court.

We agree with the court below that although there was no express stipulation as to the duration of the partnership agreement, it was by implication to continue during the term of the lease of the hotel property. The term had, therefore, not expired when on August 9, 1911, Mrs. Zimmerman, of her own motion, declared it at an end. Her right to withdraw or terminate the agreement at her own will, the agreement being for the term of the lease, depends primarily upon the law of Porto Rico, rather than the general law applicable elsewhere. The matter is regulated by §§ 1607 and 1609 of the Civil Code of Porto Rico. These sections are set out in the margin.[1]

The suggestion is that § 1607 applies only to a case where one partner desires to turn over the business and responsibility to the other. This is too narrow. The plain mandate is that a dissolution shall occur at the will or withdrawal of one partner only when the duration of the partnership has not been fixed. Section 1609 obviously deals with a dissolution upon application to a court for sufficient reason shown. But whether a dissolution declared on the motion of one of the members might be justified when later challenged, if sufficient reason for the

[1] Section 1607. The dissolution of the partnership by the will or withdrawal of one of the partners shall only take place when a term for its duration has not been fixed, or if this term does not appear from the nature of the business. In order that the withdrawal may be of effect, it must be made in good faith at the proper time; notice thereof shall also be given to the other partners.

Section 1609. No partner can demand the dissolution of a partnership which either, by a provision of the articles or by the nature of the business, has been constituted for a specified time unless there should exist sufficient reason, such as when one of the partners fails to comply with his obligations, or when he becomes incapacitated for the partnership business, or any other similar cause, in the judgment of the courts.

act was shown, is academic, so far as this appeal is affected, because the court below upon oral evidence, including that of both parties, found that no good reason in law or fact existed for the dissolution declared on August 9, 1911 by Mrs. Zimmerman. The oral evidence heard by the court in relation to the matter has not been sent up and we must presume the conclusion sound. We shall therefore assume that the partnership continued in law, until dissolved by decree for sufficient reason on May 18, 1912. As the court refused to appoint a receiver *pendente lite* upon Harding's application when his bill was filed and permitted Mr. Zimmerman to continue to conduct the partnership business, she was justly held accountable for Harding's share in the profits made during that time.

The principal argument has turned upon the consequence to be attached to the action at law brought by Harding. The claim made by the appellant, Mrs. Zimmerman, is that the bringing of that action was a conclusive election between two inconsistent remedies, and that it operated as a bar to any remedy under the present bill. If this is the case the result must be deplored, for the dismissal of this bill would leave Mrs. Zimmerman in full possession of the fruits of her lawless conduct in excluding Harding from all interest and control of the joint business, with only the right to begin over again an action at law to recover his damages.

But we think the doctrine of the election of remedies has no proper application here. The essential element of that rule is that there must have been a right of choice between two remedies which are inconsistent with each other. *Bierce* v. *Hutchins*, 205 U. S. 340. The argument is that the bringing of the suit at law was an election to treat the contract of partnership as at an end, and to recover damages for the breach, including profits prevented, while the bill in equity was based upon the theory that the partnership was continuing.

But that is a misconception of the bill. It states the same facts stated in the suit at law and alleges the illegality of the defendant's declaration of dissolution and the plaintiff's illegal exclusion from the control and possession of the joint property. But the bill does not seek a restoration of the partnership relation, nor a restoration to the joint possession or management of the partnership business. Upon the contrary, it states that a continuance of such relation is impossible. It therefore asked to have the business placed at once in the hands of a receiver and the partnership affairs liquidated and the partnership dissolved. This latter relief is but an incident to the liquidation sought of a precautionary character.

Whether the partnership had been effectually dissolved by the declaration of Mrs. Zimmerman on August 9, 1911, or not, her action in excluding Harding from joint possession and control until the affairs had been wound up was, upon either hypothesis, wholly indefensible. The partnership property continued to be partnership property after as well as before dissolution.

When she assumed the right to take possession for herself and to carry on the business with the partnership property, Harding had a clear right to call her to account for his share in all of the joint property and at his election to require her to account for the profits, by way of damages or otherwise, which he had been prevented from making by his wrongful exclusion from the business. *Ambler* v. *Whipple*, 20 Wall. 546; *Pearce* v. *Ham*, 113 U. S. 585, 593; *Karrick* v. *Hannaman*, 168 U. S. 328, 337; *Holmes* v. *Gilman*, 138 N. Y. 369.

Neither is the remedy in equity for a breach of a partnership agreement exclusive. There may be at law a recovery of all the damages which result, including damages for profits prevented by a wrongful dissolution. Thus if one member assumes to dissolve a partnership before the end of the term, the other may bring an action for

damages for the breach and recover not only his interest, but also his share of the profits which might have been made during the term. He need not wait until the expiration of the period and need not go into equity for an accounting, but may at law show the probable profits which he has been deprived of. *Bagley* v. *Smith*, 10 N. Y. 489; *Dennis* v. *Maxfield*, 10 Allen (Mass.), 138; *Karrick* v. *Hannaman*, 168 U. S. 328, 337.

The remedy at law was in every substantial feature consistent with that sought by his bill in equity, and no other form of suit was admissible in the local court. Both suits were pecuniary. Both sought compensation upon the same facts. In one Harding sought a judgment for damages which would include all that he could have in equity as the result of an accounting. The jurisdiction in equity in suits for winding up partnerships is based upon its jurisdiction in matters of complicated accounts. A dissolution, or a receivership, are mere incidents to its principal ground of jurisdiction. That in his equity suit Harding sought relief in respect to some matters not involved in or beyond the jurisdiction of the law court does not affect the question of election. That he asked to have the partnership formally declared dissolved by reason of the conduct of Mrs. Zimmerman was not antagonistic to any position he assumed in his suit at law. It was a mere incident to his right to hold her to an accounting for his share in the business. He sought to have the business wound up by a receiver. This Mrs. Zimmerman prevented and she was suffered to remain in sole possession. If she has been held to account for the profits made during that time, she cannot complain.

It has been assigned as error that Mrs. Zimmerman was allowed salary for her service in the management of the business after she assumed to be managing for herself. The partnership contract made no provision for the allowance of salaries to either partner. In the view

of the court below the exclusion of Harding from joint possession and management was without authority. In such circumstances it seems inconsistent that Mrs. Zimmerman should be allowed for services which she wrongfully took upon herself because she had unlawfully excluded Harding from participation. Probably upon the theory that her management had resulted in profit in which Harding was permitted to share it was thought equitable that she should be compensated. However this may be and reluctant as we are to its allowance (*Karrick* v. *Hannaman*, cited above) we are unable to find that any exception was filed to the allowance in the auditor's report. It does appear that the court directed the auditor to reduce the amount, which was done. But whether that was done upon an exception to the amount as excessive, or to any allowance at all, we have no information.

There is also an objection to a charge against Harding of $618 on account of some trouble with his accounts for bar receipts. The credit was made by order of the court in the final decree. There is no trace of the item in either the auditor's or master's reports. This would be ordinarily enough to justify us in shutting the item out. But this case seems to have been proceeded with in a most irregular way. There are references in the opinion and in the auditor's report to oral evidence and oral statements which have not been made a part of the transcript. If the parties elect to try a case in such an irregular way, we must presume that the decree, so far as it stands upon questions of fact, was supported by evidence not objected to.

All of the assignments must be overruled and the decree affirmed.